

EXHIBIT E

EXHIBIT O



**Homeland
Security**

Privacy Office, Mail Stop 0655

October 7, 2010

Ms. Judy Rabinovitz
ACLU Immigrants' Rights Project
125 Broad St., 18th Floor
New York, NY 10004

Re: DHS/OS/PRIV 10-1111

Dear Ms. Rabinovitz:

This acknowledges receipt of your September 21, 2010, Freedom of Information Act (FOIA) request to the Department of Homeland Security (DHS), in which you seek all records reflecting the following information for individuals who had been detained six months or longer since being taken into ICE custody (i.e., "prolonged detainees"). You specifically seek:

- a. The number of such detainees organized by field office.
- b. The nationality of such detainees.
- c. The length of such detainees' detention since being taken into ICE custody.

Your request was received in this office on September 28, 2010.

Upon initial review of your request, I have determined that, if such records exist, they may be under the purview of U.S. Immigration and Customs Enforcement (ICE). Additionally, we noted that you also directed this request to ICE. Therefore, the FOIA Officer for ICE, Catrina Pavlik-Keenan, will process and respond directly to you. You may contact that office in writing at:

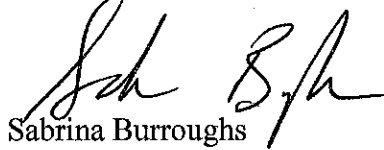
U.S. Immigration and Customs Enforcement
800 North Capitol Street, N.W., 5th Floor, Suite 585
Washington, D.C. 20528
202-732-0300

If there are any other DHS components that you would like us to search, please advise this office in writing. A list of DHS components and offices may be found at:
<http://www.dhs.gov/xabout/structure/index.shtm>, Internet accessed October 7, 2010.

As it relates to your fee waiver and expedited processing request, ICE will make a determination and reply to your request.

If you need to contact this office again concerning your request, please refer to **DHS/OS/PRIV 10-1111**. This office can be reached at 866-431-0486.

Sincerely,

A handwritten signature in black ink, appearing to read 'Sab B. Burroughs', written in a cursive style.

Sabrina Burroughs
Disclosure & FOIA Operations Manager

U.S. Department of Homeland Security

425 I Street, NW
Washington, DC 20536



**U.S. Immigration
and Customs
Enforcement**

January 26, 2009

Ms. Judy Rabinovitz
ACLU Foundation – Immigrants' Rights Project
125 Broad Street, 18th Fl.
New York, NY 10004

RE: FOIA Case Number 2009-FOIA-1238

Dear Ms. Rabinovitz:

This letter responds to your requests for a waiver of fees and the expedited processing of your Freedom of Information Act (FOIA) request dated January 13, 2009. You have requested records related to the Post-Order Custody Review Process.

As it relates to your fee waiver request, your request will be held in abeyance pending the quantification of responsive records. The DHS FOIA Regulations, 6 CFR § 5.11(k)(2), set forth six factors to examine in determining whether the applicable legal standard for a fee waiver has been met: (1) Whether the subject of the requested records concerns "the operations or activities of the government;" (2) Whether the disclosure is "likely to contribute" to an understanding of government operations or activities; (3) Whether disclosure of the requested information will contribute to the understanding of the public at large, as opposed to the individual understanding of the requestor or a narrow segment of interested persons; (4) Whether the contribution to public understanding of government operations or activities will be "significant;" (5) Whether the requester has a commercial interest that would be furthered by the requested disclosure; and (6) Whether the magnitude of any identified commercial interest to the requestor is sufficiently large in comparison with the public interest in disclosure, that disclosure is primarily in the commercial interest of the requestor. If any responsive records are located, we will consider these factors in our evaluation of your request for a fee waiver.

Immigration and Customs Enforcement (ICE) evaluates requests for expedited processing based upon the legal standards set forth in the Electronic Freedom of Information Act Amendments of 1996 as incorporated into the Department of Homeland Security's Freedom of Information Act regulations¹. These regulations establish two factors to examine in determining whether the applicable legal standard for expedited processing has been met. I have considered the following factors in my evaluation of your request for expedited processing: (1) whether the lack of an expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; and (2) if there is an urgency to inform the public about an actual or alleged federal government activity, if the request is made by a person primarily engaged in disseminating information.

¹ 6 CFR § 5.5(d).

Upon review of your request and a careful consideration of the factors listed above, I have determined to deny your request for expedited processing.

The undersigned is the person responsible for this determination. You may appeal this finding by writing to the Associate General Counsel (General Law), Department of Homeland Security, FOIA Appeals, Washington, DC 20528, within 60 days from the date of this determination. It should contain any information and state, to the extent possible, the reasons why you believe the initial determination should be reversed and the envelope in which the appeal is mailed in should be prominently marked "FOIA Appeal." The Privacy Office's determination will be administratively final.

If you have any questions pertaining to your request, please contact the FOIA Office at (202) 732-0300.

Sincerely,

Catrina M. Pavlik-Keenan
FOIA Officer

EXHIBIT F



Associate General Counsel (General Law)
Department of Homeland Security
Washington, D.C. 20528

March 20, 2009

**RE: FOIA Case Number 2009-FOIA-1238
Freedom of Information Act / Privacy Act Appeal to ICE**

Dear Associate General Counsel:

Pursuant to 6 C.F.R. § 5.9, the American Civil Liberties Union (ACLU) appeals U.S. Immigration and Customs Enforcement's (ICE) decision to deny the ACLU expedited processing of its request under the Freedom of Information Act (FOIA). The ACLU also appeals ICE's failure to grant the ACLU fee status as a "representative of the news media" and its decision to hold its request for a fee waiver in abeyance.

I. BACKGROUND

The ACLU's FOIA request seeks records related to the post-order custody review (POCR) process that the Department of Homeland Security (DHS) applies to detained non-citizens with administratively final orders of removal. *See* ACLU FOIA Request, dated Jan. 13, 2009, attached as Exh. A. In a letter dated January 26, 2009, ICE summarily denied expedited processing of that request, merely restating the standard without providing any explanation for its decision. *See* Pavlik-Keenan Letter, dated Jan. 26, 2009, at 1-2, attached as Exh. B. The letter also held the ACLU's request for a fee waiver in abeyance "pending the quantification of responsive records," *id.* at 1, and completely ignored the ACLU's request for fee status as a "representative of the news media." As set forth below, the aforementioned decisions are wholly without merit.

II. THE INSTANT FOIA REQUEST WARRANTS EXPEDITED PROCESSING

First, the ACLU's FOIA Request clearly meets the statutory and regulatory requirements for expedited processing. "With respect to a request made by a person primarily engaged in disseminating information," the Act provides that a "compelling need" for expedited

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TREASURER

processing exists where there an “urgency to inform the public concerning the public concerning actual or alleged Federal Government activity.” 5 U.S.C. § 552(a)(6)(E)(v)(II); *see also* 6 C.F.R. § 5.5(d)(1)(ii) (same). The D.C. Circuit has identified at least three factors for determining whether an “urgency to inform” exists: (1) whether the request concerns a matter of current exigency to the American public; (2) whether the consequences of delaying a response would compromise a significant recognized interest; and (3) whether the request concerns federal government activity. *Al-Fayed v. C.I.A.*, 254 F.3d 300, 310 (D.C. Cir. 2001).

There can be no doubt that the FOIA Request on its face concerns “actual or alleged federal government activity.” Moreover, the information requested concerns a matter of current public exigency: namely, the ongoing prolonged detention of scores of non-citizens without adequate procedural review. Recent news articles in major media outlets have highlighted the expansion of such mass detention and the deficiencies of the government’s review procedures.¹ Moreover, the Supreme Court has long recognized that “[f]reedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects” and that detention requires “strong procedural protections.” *Zadvydas v. Davis*, 533 U.S. 678, 690-91 (2001). Yet immigrants’ rights advocates and government oversight bodies alike have expressed serious concerns that the government’s POCR process has failed to afford meaningful, fair, and individualized review to prolonged immigration detainees and make appropriate determinations as to release or continued detention. *See* Exh. A at 2 (citing reports). The due process problems raised by prolonged mass detention in the absence of adequate review are clearly matters of urgent public concern.

For similar reasons, delaying a response would compromise a significant recognized interest—namely, both non-citizens detainees’ liberty interests against prolonged and arbitrary detention, and the public’s interest in holding the government accountable for its violations of law. Given the ongoing use of prolonged immigration detention, a delayed response here would hinder the efforts of advocacy organizations such as the ACLU and other key stakeholders to ensure that the government meets its statutory and constitutional obligations as it enforces the immigration laws.

Furthermore, the ACLU’s FOIA Request makes abundantly clear that the ACLU is an organization “primarily engaged in disseminating information.” *See* Exh. A at 6-7; *see also* 6 C.F.R. § 5.5(d)(3). As set forth in the Request, the ACLU publishes newsletters, news briefings,

¹ *See, e.g.,* Michelle Roberts, *AP IMPACT: Immigrants face detention, few rights*, Wash. Post, Mar. 15, 2009.

right-to-know handbooks, and other materials that are widely disseminated to the public. These materials are made available to everyone—including tax-exempt organizations, non-profit groups, and law students and law faculty—for either no cost or for a nominal fee through its public education department. The ACLU also disseminates information through its high-traffic website, <http://www.aclu.org>. The website provides in-depth information on a range of civil liberties issues; addresses civil liberties issues that are currently in the news; and contains hundreds of documents relating to the ACLU's work. The website specifically features information obtained through the FOIA. *See, e.g.*, <http://www.aclu.org/safefree/torture/torturefoia.html>; http://www.aclu.org/patriot_foia/index.html. The ACLU also publishes an electronic newsletter, which is distributed to subscribers via email; airs regular podcasts; and produces a television series on civil liberties issues entitled *The Freedom Files*. *See* <http://aclu.tv>.

These characteristics easily suffice to convey “representative of the news media organization” status on the ACLU. *See National Security Archive v. Dep’t of Defense*, 880 F.2d 1381, 1387 (D.C. Cir. 1989) (noting that in determining whether a requester is a representative of the news media, the critical question is whether the entity in question “gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience”) (construing 5 U.S.C. § 552(a)(4)(A)(iii)); *Elec. Privacy Info. Ctr. v. Dep’t of Defense*, 241 F. Supp. 2d 5, 11 (D.D.C. 2003) (“It is critical that the phrase ‘representative of the news media’ be broadly interpreted if the act is to work as expected . . . I[n] fact, any person or organization which regularly publishes or disseminates information to the public . . . should qualify for waivers as a ‘representative of the news media.’”). Courts, moreover, have recognized that organizations that meet the “representative of the news media” standard necessarily meet the “primarily engaged in disseminating information” standard. *See ACLU v. United States Dep’t of Justice*, 321 F. Supp. 2d 24, 30, n.5 (D.D.C. 2004) (holding that a FOIA requester that was a “representative of the news media” for purposes of a fee waiver was indeed “primarily engaged in disseminating information” for expedited processing purposes).

Courts have also specifically recognized that advocacy organizations like the ACLU which disseminate information and conduct public education on civil rights issues are entitled to expedited processing. *See Leadership Conf. on Civil Rights v. Gonzales*, 404 F. Supp. 2d 246, 260 (D.D.C. 2005) (holding that organization that “disseminates information regarding civil rights . . . to educate the public, promote effective civil rights laws and ensure their enforcement by the Department of Justice” was entitled to expedited processing). As described in its

FOIA request, the ACLU is a nationwide, nonprofit, nonpartisan organization dedicated to protecting civil rights and civil liberties in the United States and disseminating information on these issues through diverse means. *See* Exh. A at 6. For all these reasons, the ACLU is “primarily engaged in disseminating information,” and its FOIA request should be processed in an expedited manner.

III. THE INSTANT FOIA REQUEST WARRANTS A FEE WAIVER.

Furthermore, the agency erred with respect to the ACLU’s fee requests. First, the agency incorrectly wholly ignored the ACLU’s request for fee status as a “representative of the news media.” Yet, as set forth above, there is no question that the ACLU is entitled to this fee status under the Act. *See supra*. Moreover, the agency’s letter cites no authority for holding the ACLU’s fee waiver request in abeyance. This decision is particularly unreasonable in light of the fact that government agencies in numerous comparable instances have granted the ACLU fee waivers in the past. *See* Exh. A at 7 n.6.²

Indeed, as set forth below, the FOIA Request here clearly meets the statutory and regulatory requirements for fee waivers. *See* 5 U.S.C. § 552(a)(4)(A)(iii) (providing for fee waiver where disclosure is “likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester”); *see also* 6 C.F.R. § 5.11(k).

- (1) First, the subject of the requested records directly concerns “the operations or activities of the government.” 6 C.F.R. § 5.11(k)(2)(i). Specifically, the FOIA request seeks disclosure of records relating to the government’s administration of the POCR process for non-citizen detainees with administratively final orders of removal.

² In addition to the examples listed in the FOIA request, agencies have granted fee waivers to the ACLU on numerous other occasions. For example, the Department of Justice granted a fee waiver to the ACLU with regard to a December 2008 FOIA request for records related to the detention, interrogation, treatment, or prosecution of suspected terrorists. The Department of Justice also did not charge the ACLU fees associated with FOIA requests submitted by the ACLU in November 2007, December 2005, and December 2004. The Department of Health and Human Services granted a fee waiver with regard to a FOIA request submitted in November 2006. In May 2005, the United States Department of Commerce granted a fee waiver to the ACLU with respect to its request for information regarding the radio-frequency identification chips in United States passports. In March 2005, the Department of State granted a fee waiver to the ACLU with regard to a request submitted that month regarding the use of immigration laws to exclude prominent non-citizen scholars and intellectuals from the country because of their political views, statements, or associations. In addition, the Department of Defense did not charge the ACLU fees associated with FOIA requests submitted by the ACLU in April 2007, June 2006, February 2006, and October 2003.

- (2) Moreover, disclosure of requested records is “likely to contribute to an understanding of government operations or activities” for the reasons listed above. 6 C.F.R. § 5.11(k)(2)(ii). The ACLU intends to keep the public at large informed about the content of the responsive records. These records would not be “duplicative or substantially identical” with presently available information as they do not yet exist in the public domain. *See id.*
- (3) Any requested records disclosed by DHS would not be used for “the individual understanding of the requestor,” but rather for “the understanding of a reasonably broad audience of persons interested in the subject.” 6 C.F.R. § 5.11(k)(2)(iii). As noted in the FOIA request, the ACLU is a nationwide, nonprofit, nonpartisan organization that broadly disseminates information on civil rights and civil liberties issues through a wide array of media. *See* Exh. A. at 6. Thus, the ACLU has “expertise in the subject area and ability and intention to effectively convey information to the public.” 6 C.F.R. § 5.11(k)(2)(iii).
- (4) The contribution of responsive records to public understanding of government operations regarding the POCR process would also be very “significant.” *See* 6 C.F.R. § 5.11(k)(2)(iv). Presently, the public knows very little about the procedures afforded non-citizens who are detained for prolonged periods of time. ICE’s response to the FOIA request will help the larger public understand whether its government is complying with its statutory and constitutional obligations against subjecting immigrants to unlawful and arbitrary detention, and what procedures the government follows in order to ensure that individuals are released where appropriate.
- (5) The ACLU has no commercial interest in the disclosure of the requested records. *See* 6 C.F.R. § 5.11(k)(3)(i). As explained in the FOIA request, the ACLU is a non-profit organization dedicated to protecting civil rights and civil liberties in the United States. *See* Exh. A at 6. The ACLU intends to use the records for the purpose of keeping the public informed about the government’s immigration detention practices.
- (6) Finally, the public interest in the disclosure of the requested records is significant. *See* 6 C.F.R. § 5.11(k)(3)(ii). The FOIA request concerns the fundamental liberty interest against unlawful and arbitrary detention. In requesting the records at issue, the ACLU seeks to ensure that non-citizens are afforded constitutionally adequate review over their imprisonment and not illegally subject to prolonged detention. As set forth in the request, immigrants’ rights advocates

and government oversight bodies alike have expressed serious concerns about the adequacy of the POCR process, and there is significant evidence that immigrants are being improperly held in DHS custody. *See* Exh. A at 2. Were the public denied its right under FOIA to access records relating to the custody review process, the government could continue to subject immigrants to prolonged detention without meaningful review, to the substantial impairment immigrants' due process rights.

For the foregoing reasons, we respectfully request that the agency grant expedited processing for the instant request. In addition, we ask that the agency grant the ACLU a fee waiver or, in the alternative, grant it fee status as a "representative of the news media." We look forward to your prompt response.

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Sincerely,



Judy Rabinovitz
Deputy Director
ACLU Immigrants' Rights Project
125 Broad St., 18th Floor
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CC: Catrina Pavlik-Keenan
FOIA Officer
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January 13, 2009

Catrina Pavlik-Keenan
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Katherine Gallo
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**RE: FOIA Request for Records Related to the Post-Order Custody
Review Process (POCR)**

Dear Freedom of Information Officers:

This letter constitutes a request pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, submitted on behalf of the Immigrants' Rights Project (IRP) of the American Civil Liberties Union (ACLU). The IRP is also requesting the expedited processing of this request, pursuant to 5 U.S.C. § 552(a)(6)(E) and agency regulations, and a fee waiver, pursuant to 5 U.S.C. § 552(a)(4)(A)(iii). This request is being simultaneously filed with the U.S. Immigration and Customs Enforcement (ICE), the Office of the Inspector General, and the U.S. Department of Homeland Security (DHS).

BACKGROUND

In 2001, the Supreme Court held that, under the Immigration and Nationality Act, 8 U.S.C. § 1231, a noncitizen with a final order of removal can only be

detained for the period reasonably necessary to effectuate his or her removal from the United States. The Court also found six months from the date of a final order of removal to be a presumptively reasonable period of time. *See Zadvydas v. Davis*, 533 U.S. 678, 701 (2001). Regulations designed to implement *Zadvydas* were promulgated in November 2001.¹ These regulations established a set of post-order custody review (POCR) procedures for determining, *inter alia*, whether an individual detainee will be detained or released following the 90 day removal period, *see* 8 C.F.R. § 241.4, and whether there is a significant likelihood of removal in the reasonably foreseeable future. *See* 8 C.F.R. § 241.13.

Since its establishment, however, immigrants' rights advocates and government oversight bodies alike have expressed serious concerns about the POCR process' adequacy. Reviews of the POCR process strongly suggest that it does not afford meaningful, fair, and individualized review to prolonged immigration detainees and that ICE officials are not making appropriate determinations as to release or continued detention.²

Moreover, the government is currently applying the POCR procedure to noncitizens whose removal orders have been judicially stayed pending adjudication of their immigration appeals, even though the regulations are silent as to these individuals. Immigration law practitioners regularly report that the government appears to treat the existence of a stay as a *per se* basis for denying release, on the grounds that individuals with stays are inherent flight risks.

¹ *See* Continued Detention of Aliens Subject to Final Orders of Removal, 66 Fed. Reg. 56967 (Nov. 14, 2001) codified at 8 C.F.R. §§ 241.4, 241.13, 241.14.

² *See, e.g.*, General Accounting Office, *Better Data and Controls Are Needed to Assure Consistency with the Supreme Court Decision on Long-Term Alien Detention*, GAO-04-434 (May 2004) (finding that ICE's database could not even identify the detainees entitled to a custody review and that ICE was possibly violating POCR regulations); Dep't of Homeland Security Office of the Inspector General, *ICE's Compliance with Detention Limits for Aliens with a Final Order of Removal from the United States*, OIG-07-28, at 1 (Feb. 2007) (reporting ICE's failure to provide custody reviews in a timely manner and, in some cases, its failure to provide them at all; ICE's improper suspension of detainees from the review process; ICE's failure to provide sufficient guidance to its field offices on *Zadvydas*; non-uniform practices across field offices; and ICE's ineffective oversight efforts); Kathleen Glynn & Sarah Bronstein, *Systemic Problems Persist In U.S. ICE Custody Reviews for "Indefinite" Detainees*, at 1-2 (Catholic Legal Immigration Network, Inc. 2005) (reporting poor record keeping, failure to conduct timely custody reviews, staff shortages, lack of communication with and information provided to detainees, and non-uniform practices across field offices).

As *Zadvydas* makes clear, the inadequacy of the POOCR process implicates serious constitutional concerns as “[f]reedom from imprisonment—from government custody, detention, or other forms of restraint—lies at the heart of the liberty.” *Zadvydas*, 533 U.S. at 682, 690. Moreover, the issue of the POOCR process’ adequacy has become especially acute as the government exponentially increases its use of immigration detention and subjects increasing numbers of noncitizens to prolonged imprisonment.³

Public scrutiny of the POOCR process is therefore necessary to ensure the agency manages its detained population in a manner that is consistent with its statutory and constitutional obligations. While the reports on the POOCR to date are certainly useful, they are limited in scope, and none of the underlying agency records are readily available for review.⁴ Far more information is needed for a full review of POOCR process.

RECORDS REQUESTED

Please disclose:

1. All records⁵ reflecting the following information for individuals who were detained six months or longer (hereinafter “prolonged detainees”) as of December 31, 2008:
 - a. The number of such detainees organized by field office.
 - b. The nationality of such detainees.
 - c. The length of such detainees’ detention.

³ For example, in 1997, the number of immigrants detained by the U.S. Immigration and Naturalization Service on any given day was approximately 13,000. U.S. Dep’t of Justice, Office of the Federal Detention Trustee, Detention Needs Assessment and Baseline Report: a Compendium of Federal Detention Statistics, *available at* <http://www.usdoj.gov/ofdt/>. Just ten years later, the national daily ICE detainee population had surpassed 30,000. Anna Gorman, *Immigration Detainees are at Record Levels*, L.A. Times, Nov. 5, 2007, at B1. *See also* OIG-07-28, at 1 (finding that ICE “is not well positioned to oversee the growing detention caseload that will be generated by DHS’ planned enhancements to secure the border.”).

⁴ For example, the OIG’s review did not address the “sufficiency of release decisions” and the “success of alternatives to detention,” and the study was also not designed to review ICE practices nationwide. *See* OIG-07-28, at 44. The CLINIC report was generated from interviews with practitioners lacking full and direct access to agency records.

⁵ *See* 5 U.S.C. § 552(2) (defining “record” as “(A) any information that would be an agency record subject to the requirements of this section when maintained by an agency in any format, including an electronic format; and (B) any information described under subparagraph (A) that is maintained for an agency by an entity under Government contract, for the purposes of records management.”).

- d. The number of such detainees with an administratively final order of removal.
- e. The number of such detainees with an administratively final order of removal that was judicially stayed.
- f. The number of such detainees whose removal proceedings were pending before the Immigration Judge.
- g. The number of such detainees whose removal proceedings were pending before the Board of Immigration Appeals.
- h. The number of such detainees whose removal proceedings were pending before the Court of Appeals.
- i. The number of such detainees whose removal proceedings were pending before the Immigration Judge or Board of Immigration Appeals on remand.

- 2. All 90-day and 180-day post-order custody review (POCR) decisions for prolonged detainees from November 1, 2007 onwards, organized per detainee.
- 3. All records reflecting the following information for prolonged detainees who were released from custody from November 14, 2001 onward because they won their removal cases:
 - a. The number of such detainees released per year.
 - b. The number of such detainees organized by field office.
 - c. The nationality of such detainees.
 - d. The length of such detainees' detention.
- 4. All 90-day and 180-day post-order custody review (POCR) decisions for prolonged detainees who were released from custody from November 14, 2001 onwards because they won their removal cases, organized per detainee
- 5. All records reflecting the following information for detainees who were released at their 90-day custody review from November 14, 2001 onward:
 - a. The number of such detainees per year.
 - b. The number of such detainees organized by field office.
 - c. The nationality of such detainees.
 - d. The number of such detainees with an administratively final order of removal that was judicially stayed, and the field office and nationality of such detainees
- 6. All records reflecting the following information for detainees who were detained six months or longer following the entry of an administratively final order of removal that was not judicially stayed (hereinafter "*Zadvydas* detainees") from November 14, 2001 onward.
 - a. The number of such detainees per year.
 - b. The number of such detainees organized by field office.
 - c. The nationality of such detainees.

- d. The length of such detainees' detention.
- 7. All 90-day and 180-day post-order custody review (POCRs) decisions for all *Zadvydas* detainees from November 14, 2001 onwards, organized per detainee.
- 8. All records reflecting the following information for all *Zadvydas* detainees who were removed from the United States from November 14, 2001 onward:
 - a. The number of such detainees per year.
 - b. The number of such detainees organized by field office.
 - c. The nationality of such detainees.
 - d. The length of such detainees' detention.
 - e. The length of such detainees' detention beyond the 90-day removal period.
- 9. All records reflecting the following information for all detainees with administratively final orders of removal that were not judicially stayed, and who were released from custody from November 14, 2001 onward because their removal was not significantly likely in the reasonably foreseeable future:
 - a. The number of such detainees released per year.
 - b. The number of such detainees released per year by field office.
 - c. The nationality of such detainees.
 - d. The length of such detainees' detention.
 - e. The length of such detainees' detention beyond the 90-day removal period.
 - f. The number of such detainees who filed petitions for writs of habeas corpus, and the case name and court where such petitions were filed.
 - g. The number of such detainees who were released pursuant to writs of habeas corpus.
 - h. The numbers of such detainees who are currently released on supervision orders.
 - i. The conditions of supervised release of such detainees, including but not limited to release notices and orders, supervision orders, Intensive Supervision and Appearance Program (ISAP) conditions, and Enhanced Supervision/Reporting (ESR) conditions.
- 10. All records related to DHS, ICE, Headquarters Post-Order Detention Unit (HQPDU), and individual ICE field office policies, procedures, and/or guidelines on POCRs and conditions of supervised release, including but not limited to manuals, guidances, instructions, policy statements, legal memoranda, training materials, and sample forms, worksheets, and letters.

11. All records related to DHS, ICE, Headquarters Post-Order Detention Unit (HQPDU), and individual ICE field office policies, procedures, and/or guidelines regarding the detention, custody review, release, and conditions of supervision of noncitizens whose removal has been judicially stayed, including but not limited to manuals, guidances, instructions, policy statements, legal memoranda, training materials, and sample forms, worksheets, and letters.
12. All records and statistics compiled for the OIG's review of the POOCR process, *ICE's Compliance with Detention Limits for Aliens with a Final Order of Removal from the United States*, OIG-07-28 (Feb. 2007).

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UNION FOUNDATION

THE REQUESTOR

The ACLU is a nationwide, nonprofit, and nonpartisan organization dedicated to protecting civil rights and civil liberties in the United States. It is the largest civil liberties organization in the country, with offices in the 50 states and over 500,000 members. The ACLU is dedicated to holding the U.S. government accountable to principles of due process and the U.S. Constitution in general, including those principles that bear on detention and other significant deprivations of liberty.

The ACLU publishes newsletters, news briefings, right-to-know handbooks, and other materials that are widely disseminated to the public. These materials are made available to everyone—including tax-exempt organizations, non-profit groups, and law students and law faculty—for either no cost or for a nominal fee through its public education department.

The ACLU also disseminates information through its high-traffic website, <http://www.aclu.org>. The website provides in-depth information on a range of civil liberties issues; address civil liberties issues that are currently in the news; and contains hundreds of documents relating to the ACLU's work. The website also specifically features information obtained through the FOIA. See, e.g., <http://www.aclu.org/safefree/torture/torturefoia.html>; http://www.aclu.org/patriot_foia/index.html. The ACLU also publishes an electronic newsletter, which is distributed to subscribers via email; airs regular podcasts; and produces a television series on civil liberties issues entitled *The Freedom Files*. See <http://aclu.tv>.

Accordingly, the ACLU is an organization whose "main professional activity or occupation is information dissemination." 6 C.F.R. § 5.5(d)(3). The ACLU is also a "representative of the news media" within the meaning of the statute and applicable regulations. See 5 U.S.C. § 552(a)(4)(A)(iii).

(defining a representative of the news media as an entity that “gathers information of potential interest to a segment of the public” and “uses its editorial skills to turn raw materials into a distinct work, and distributes that work to an audience”); *see also National Sec. Archive v. U.S. Department of Defense*, 880 F.2d 1381, 1397 (D.C. Cir. 1989) (same); 45 C.F.R. § 5.5 (defining representative of the news media as “a person actively gathering information for an entity organized and operated to publish or broadcast news to the public”).

EXPEDITED PROCESSING

We request Track 1 expedited treatment for this FOIA request. This request qualifies for expedited treatment pursuant to 5 U.S.C. § 552(a)(6)(E) and applicable regulations. As set forth above, there is a “compelling need” for expedited processing of this request, *see* 5 U.S.C. § 552(a)(6)(E)(i)(I), namely, an “urgency to inform the public concerning the public concerning actual or alleged Federal Government activity.” 5 U.S.C. § 552(a)(6)(E)(v)(II); *see also* 6 C.F.R. § 5.5(d)(1)(ii) (same). The ACLU is therefore entitled to expedited processing of this request.

FEE WAIVER

The ACLU also requests a full fee waiver on the grounds that disclosure of the requested records is in the public interest and is “likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii); *see also* 45 C.F.R. § 5.45.

As set forth above, this request aims at furthering public understanding of government conduct: specifically, whether the post-order custody reviews for detainees in the custody of ICE are sufficient to satisfy the agency’s statutory and constitutional obligations. In this respect, the request strongly resembles the many previous instances in which government waived all fees associated with responding to FOIA requests by the ACLU.⁶

⁶ The following are recent examples of requests in which agencies did not charge the ACLU fees associated with responding to its FOIA requests: (1) a FOIA request submitted to the Department of State in April 2005; (2) a FOIA request submitted to the National Institute of Standards and Technology in April 2005; (3) a FOIA request submitted to the Office of Science and Technology in the Executive Office of the President in August 2003; (4) a FOIA request submitted to the Federal Bureau of Investigation in August 2002; (5) a FOIA request submitted to the Office of Intelligence Policy and Review in August 2002; (6) a FOIA request submitted to the Office of Information and Privacy in the Department of Justice in August 2002.

In any event, as discussed *supra*, the ACLU is a “representative of the news media” and does not seek the records requested for commercial use. Accordingly, should the government assess fees for the processing of this request, those fees should be “limited to reasonable standard charges for document duplication” alone. 5 U.S.C. § 552(a)(4)(A)(ii)(II).

* * *

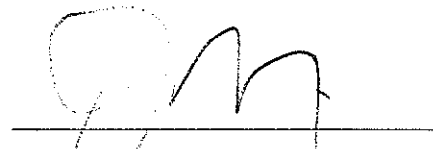
Thank you for your consideration of this request. If this request is denied in whole or in part, the ACLU asks that the government justify all redactions by reference to the specific exemptions of the FOIA. We expect that the government release all segregable portions of otherwise exempt material. We reserve the right to appeal a decision to withhold any information or to deny expedited processing or a waiver of fees. We look forward to your request to our request for expedited processing within ten (10) business days, as required under 5 U.S.C. § 552(a)(6)(E)(ii)(I). Notwithstanding our request for expedited processing, we alternatively look forward to your reply to this request within twenty (20) business days, as required under 5 U.S.C. § 552(a)(6)(A)(I).

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION

Please respond to Judy Rabinovitz, Deputy Director, ACLU Immigrants’ Rights Project, 125 Broad St., 18th Floor, New York, NY 10004, Tel: 212-549-2618, Email: jrabinovitz@aclu.org. Also, please notify us in advance if the cost of photocopying the documents requested exceed \$100.00.

* * *

Under penalty of perjury, I certify, to the best of my knowledge and belief, that the above information is true and correct.



Judy Rabinovitz
ACLU Immigrants’ Rights Project
125 Broad St., 18th Floor
New York, NY 10004
Tel: 212-549-2618
Fax: 212-549-2654
Email: jrabinovitz@aclu.org

U.S. Department of Homeland Security

425 I Street, NW
Washington, DC 20536



**U.S. Immigration
and Customs
Enforcement**

January 26, 2009

Ms. Judy Rabinovitz
ACLU Foundation – Immigrants' Rights Project
125 Broad Street, 18th Fl.
New York, NY 10004

RE: FOIA Case Number 2009-FOIA-1238

Dear Ms. Rabinovitz:

This letter responds to your requests for a waiver of fees and the expedited processing of your Freedom of Information Act (FOIA) request dated January 13, 2009. You have requested records related to the Post-Order Custody Review Process.

As it relates to your fee waiver request, your request will be held in abeyance pending the quantification of responsive records. The DHS FOIA Regulations, 6 CFR § 5.11(k)(2), set forth six factors to examine in determining whether the applicable legal standard for a fee waiver has been met: (1) Whether the subject of the requested records concerns "the operations or activities of the government;" (2) Whether the disclosure is "likely to contribute" to an understanding of government operations or activities; (3) Whether disclosure of the requested information will contribute to the understanding of the public at large, as opposed to the individual understanding of the requestor or a narrow segment of interested persons; (4) Whether the contribution to public understanding of government operations or activities will be "significant;" (5) Whether the requester has a commercial interest that would be furthered by the requested disclosure; and (6) Whether the magnitude of any identified commercial interest to the requestor is sufficiently large in comparison with the public interest in disclosure, that disclosure is primarily in the commercial interest of the requestor. If any responsive records are located, we will consider these factors in our evaluation of your request for a fee waiver.

Immigration and Customs Enforcement (ICE) evaluates requests for expedited processing based upon the legal standards set forth in the Electronic Freedom of Information Act Amendments of 1996 as incorporated into the Department of Homeland Security's Freedom of Information Act regulations¹. These regulations establish two factors to examine in determining whether the applicable legal standard for expedited processing has been met. I have considered the following factors in my evaluation of your request for expedited processing: (1) whether the lack of an expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; and (2) if there is an urgency to inform the public about an actual or alleged federal government activity, if the request is made by a person primarily engaged in disseminating information.

¹ 6 CFR § 5.5(d).

Upon review of your request and a careful consideration of the factors listed above, I have determined to deny your request for expedited processing.

The undersigned is the person responsible for this determination. You may appeal this finding by writing to the Associate General Counsel (General Law), Department of Homeland Security, FOIA Appeals, Washington, DC 20528, within 60 days from the date of this determination. It should contain any information and state, to the extent possible, the reasons why you believe the initial determination should be reversed and the envelope in which the appeal is mailed in should be prominently marked "FOIA Appeal." The Privacy Office's determination will be administratively final.

If you have any questions pertaining to your request, please contact the FOIA Office at (202) 732-0300.

Sincerely,

Catrina M. Pavlik-Keenan
FOIA Officer

EXHIBIT G

U.S. Department of Homeland Security
800 North Capitol Street, NW, Suite 585
Washington, DC 20536



U.S. Immigration
and Customs
Enforcement

September 30, 2009

Judy Rabinovitz
ACLU Foundation – Immigrants' Rights Project
125 Broad Street, 18th Floor
New York, NY 10004

Re: Freedom of Information Act Request #2009FOIA1238 & 2009FOIA3496

Dear Ms. Rubinovitz:

This letter is the final response to your Freedom of Information Act (FOIA) requests, dated January 13, 2009 to the U.S. Department of Homeland Security (DHS), Office of Inspector General (OIG) and Immigration and Customs Enforcement (ICE), for records related to the Post-Order Custody Review Process. These responses are being combined due to their similar subject matter. Your request addressed to ICE was received in this office on January 14, 2009. The request addressed to OIG was referred to this office on May 21, 2009.

A search of the ICE Office of Detention and Removal Operations (DRO) for documents responsive to your request produced a total of 742 pages and 2 Excel Files responsive to items 1, 3, 6, 8, 9, 10, and 11 of your request. Of these pages, I have determined that portions of 242 pages are exempt from disclosure pursuant to FOIA Exemptions (b)(2)High, (b)(5), (b)(6), and (b)(7)(C).

DRO was unable to locate records responsive to items 2, 4, 5, and 7 of your request letter. The data requested under these items is not tracked in the DRO databases.

During our search for responsive records, we located 7 pages that originated within the U.S. Department of Justice, Executive Office for Immigration Review (EOIR). In addition, I believe EOIR may have records responsive to item 9(f) of your request letter. Therefore, I am referring your request to the FOIA Officer for EOIR, for processing and direct response to you. You may contact that office in writing at FOIA/PA Requests, 5107 Leesburg Pike, Suite 2600, Falls Church 22041 or via telephone at (703) 605-1297.

In response to item 12 of your request, the Office of Inspector General (OIG) provided the ICE FOIA office with 273 pages of responsive records as well as a CD containing the DACS Software Program. The DACS Software Program is being withheld in its entirety under FOIA Exemption (b)(2)High as described below. Portions of the other records are also being withheld as described below.

Portions of 242 pages as well as the DACS software program in its entirety are being withheld as described below.

FOIA Exemption 2(high) protects information applicable to internal administrative and personnel matters, such as operating rules, guidelines, and manual of procedures of examiners or adjudicators, to the extent that disclosure would risk circumvention of an agency regulation or statute, impede the effectiveness of an agency's activities, or reveal sensitive information that may put the security and safety of an agency activity or employee at risk. Whether there is any public interest in disclosure is legally irrelevant. Rather, the concern under high 2 is that a FOIA disclosure should not benefit those attempting to violate the law and avoid detection.

www.ice.gov

FOIA Exemption 5 protects from disclosure those inter- or intra-agency documents that are normally privileged in the civil discovery context. The three most frequently invoked privileges are the deliberative process privilege, the attorney work-product privilege, and the attorney-client privilege. After carefully reviewing the responsive documents, I determined that portions of the responsive documents qualify for protection under the Deliberative Process Privilege and the Attorney-Client Privilege.

- **Deliberative Process Privilege**

The deliberative process privilege protects the integrity of the deliberative or decision-making processes within the agency by exempting from mandatory disclosure opinions, conclusions, and recommendations included within inter-agency or intra-agency memoranda or letters. The release of this internal information would discourage the expression of candid opinions and inhibit the free and frank exchange of information among agency personnel.

- **Attorney-Client Privilege**

The attorney-client privilege protects confidential communications between an attorney and his client relating to a legal matter for which the client has sought professional advice. It applies to facts divulged by a client to his attorney, and encompasses any opinions given by an attorney to his client based upon, and thus reflecting, those facts, as well as communications between attorneys that reflect client-supplied information. The attorney-client privilege is not limited to the context of litigation.

FOIA Exemption 6 exempts from disclosure personnel or medical files and similar files the release of which would cause a clearly unwarranted invasion of personal privacy. This requires a balancing of the public's right to disclosure against the individual's right privacy. The types of documents and/or information that we have withheld may consist of social security numbers, home addresses, dates of birth, or various other documents and/or information belonging to a third party that are considered personal. The privacy interests of the individuals in the records you have requested outweigh any minimal public interest in disclosure of the information. Any private interest you may have in that information does not factor into the aforementioned balancing test.

FOIA Exemption 7(C) protects records or information compiled for law enforcement purposes that could reasonably be expected to constitute an unwarranted invasion of personal privacy. This exemption takes particular note of the strong interests of individuals, whether they are suspects, witnesses, or investigators, in not being unwarrantably associated with alleged criminal activity. That interest extends to persons who are not only the subjects of the investigation, but those who may have their privacy invaded by having their identities and information about them revealed in connection with an investigation. Based upon the traditional recognition of strong privacy interest in law enforcement records, categorical withholding of information that identifies third parties in law enforcement records is ordinarily appropriate. As such, I have determined that the privacy interest in the identities of individuals in the records you have requested clearly outweigh any minimal public interest in disclosure of the information. Please note that any private interest you may have in that information does not factor into this determination.

You have a right to appeal the above withholding determination. Should you wish to do so, you must send your appeal and a copy of this letter, within 60 days of the date of this letter, to: Associate General Counsel (General Law), U.S. Department of Homeland Security, Washington, D.C. 20528, following the procedures outlined in the DHS regulations at 6 C.F.R. § 5.9. Your envelope and letter should be marked "FOIA Appeal." Copies of the FOIA and DHS regulations are available at www.dhs.gov/foia.

If you need to contact our office about this matter, please refer to case number **2009FOIA1238**. This office can be reached at (202) 732-0300 or (866) 633-1182.

Sincerely,



Catrina M. Pawlik-Keenan
FOIA Officer

Enclosure(s): 742 Pages, 2 Excel Files

EXHIBIT H



November 30, 2009

Associate General Counsel (General Law)
Department of Homeland Security
Washington, D.C. 20528

**RE: FOIA Case Number 2009-FOIA-1238 & 2009 FOIA3496
Freedom of Information Act / Privacy Act Appeal to ICE**

Dear Associate General Counsel:

Pursuant to 6 C.F.R. § 5.9, the American Civil Liberties Union (ACLU) appeals U.S. Immigration and Customs Enforcement's (ICE) final response to its request under the Freedom of Information Act (FOIA).

The ACLU's FOIA request seeks records related to the post-order custody review (POCR) process that the Department of Homeland Security (DHS) applies to detained non-citizens with administratively final orders of removal. *See* ACLU FOIA Request, dated Jan. 13, 2009, attached as Exh. A. In a letter dated September 30, 2009, ICE provided a partial response to the request. Specifically, ICE provided some documents in response to items 1, 3, 6, 8, 9, 10, and 11, while redacting from disclosure certain of these documents under exemptions (b)(2), (b)(5), (b)(6), and (b)(7)(C). ICE stated that it was unable to locate any records responsive to items 2, 4, 5, and 7 of our request on the ground that these items are not tracked in DRO databases. *See* Pavlik-Keenan Letter, dated Sept. 30, 2009, at Para. 3, attached as Exh. B.

ICE's response to the FOIA request is inadequate for the following reasons:

First, it is unclear if certain of the documents provided are truly responsive. *See* Judy Rabinovitz Letter, dated November 20, 2009, attached as Exh. C. (requesting clarification as to database search queries that produced the allegedly responsive documents). For example, the response purports to provide data pertaining to detainees whose removal orders have been judicially stayed (as requested in items 6, 8, and 9). Yet a document released as part of the response states that ICE is "unable to determine which cases were judicially stayed by records in the database alone." *See* Memo from Jessica Fields, dated April 20, 2009, at p. 2, Item 1.e, attached as Exhibit D,

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PLEASE RESPOND TO:
NATIONAL OFFICE
125 BROAD STREET, 18TH FL.
NEW YORK, NY 10004-2400
T/212.549.2660
F/212.549.2654
WWW.ACLU.ORG

CALIFORNIA OFFICE
39 DRUMM STREET
SAN FRANCISCO, CA 94111-4805
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F/415.395.0950

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PRESIDENT

ANTHONY D. ROMERO
EXECUTIVE DIRECTOR

RICHARD ZACKS
TREASURER

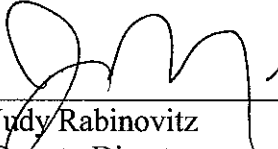
Second, the response is incomplete and does not reflect the kind of adequate search that FOIA contemplates. No response is provided for items 2, 4, 5 and 7, and only a partial response is provided to the other items. It appears that ICE confined its search to DRO databases rather than searching for responsive documents apart from such databases. *See, e.g.,* Exhibit B, at para. 3, stating that DRO was unable to locate records responsive to these items since "the data requested under these items is not traced in the DRO databases." This is insufficient to satisfy the requirement of a "reasonable effort" under 5 U.S.C. § 552(a)(3)(B)-(C).

Finally, petitioners seek review of the exemptions invoked by ICE as a basis for redacting certain documents.

Pursuant to 5 U.S.C. § 552(a)(6)(A)(ii), we expect a response within the twenty (20) day statutory time limit. If you have any questions in processing this request, I can be contacted by mail at the address below or by telephone at (212) 549-2618.

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION

Sincerely,



Judy Rabinovitz
Deputy Director
ACLU Immigrants' Rights Project
125 Broad St., 18th Floor
New York, NY 10004
Tel: 212-549-2618
Fax: 212-549-2654
Email: jrabinovitz@aclu.org

CC: Catrina Pavlik-Keenan
FOIA Officer
U.S. Immigration and Customs Enforcement
800 North Capitol St., NW
5th Floor, Suite 585
Washington, DC 20528

Exhibit A

LEGAL DEPARTMENT
IMMIGRANTS'
RIGHTS PROJECT



January 13, 2009

Catrina Pavlik-Keenan
FOIA Officer
U.S. Immigration and Customs Enforcement
800 North Capitol St., NW
5th Floor, Suite 585
Washington, DC 20528

Katherine Gallo
FOIA Officer
Office of the Inspector General
245 Murray Drive, Bldg. 410
Mail Stop 2600
Washington, DC 20528-0001

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EXECUTIVE DIRECTOR

RICHARD ZACKS
TREASURER

Catherine M. Papoi
FOIA Officer
U.S. Department of Homeland Security
Privacy Office
Director, Disclosure & FOIA
245 Murray Drive SW, Bldg. 410
Mail Stop 0550
Washington, DC 20528-0550

**RE: FOIA Request for Records Related to the Post-Order Custody
Review Process (POCR)**

Dear Freedom of Information Officers:

This letter constitutes a request pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, submitted on behalf of the Immigrants' Rights Project (IRP) of the American Civil Liberties Union (ACLU). The IRP is also requesting the expedited processing of this request, pursuant to 5 U.S.C. § 552(a)(6)(E) and agency regulations, and a fee waiver, pursuant to 5 U.S.C. § 552(a)(4)(A)(iii). This request is being simultaneously filed with the U.S. Immigration and Customs Enforcement (ICE), the Office of the Inspector General, and the U.S. Department of Homeland Security (DHS).

BACKGROUND

In 2001, the Supreme Court held that, under the Immigration and Nationality Act, 8 U.S.C. § 1231, a noncitizen with a final order of removal can only be

detained for the period reasonably necessary to effectuate his or her removal from the United States. The Court also found six months from the date of a final order of removal to be a presumptively reasonable period of time. *See Zadvydas v. Davis*, 533 U.S. 678, 701 (2001). Regulations designed to implement *Zadvydas* were promulgated in November 2001.¹ These regulations established a set of post-order custody review (POCR) procedures for determining, *inter alia*, whether an individual detainee will be detained or released following the 90 day removal period, *see* 8 C.F.R. § 241.4, and whether there is a significant likelihood of removal in the reasonably foreseeable future. *See* 8 C.F.R. § 241.13.

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Since its establishment, however, immigrants' rights advocates and government oversight bodies alike have expressed serious concerns about the POCR process' adequacy. Reviews of the POCR process strongly suggest that it does not afford meaningful, fair, and individualized review to prolonged immigration detainees and that ICE officials are not making appropriate determinations as to release or continued detention.²

Moreover, the government is currently applying the POCR procedure to noncitizens whose removal orders have been judicially stayed pending adjudication of their immigration appeals, even though the regulations are silent as to these individuals. Immigration law practitioners regularly report that the government appears to treat the existence of a stay as a *per se* basis for denying release, on the grounds that individuals with stays are inherent flight risks.

¹ *See* Continued Detention of Aliens Subject to Final Orders of Removal, 66 Fed. Reg. 56967 (Nov. 14, 2001) codified at 8 C.F.R. §§ 241.4, 241.13, 241.14.

² *See, e.g.,* General Accounting Office, *Better Data and Controls Are Needed to Assure Consistency with the Supreme Court Decision on Long-Term Alien Detention*, GAO-04-434 (May 2004) (finding that ICE's database could not even identify the detainees entitled to a custody review and that ICE was possibly violating POCR regulations); Dep't of Homeland Security Office of the Inspector General, *ICE's Compliance with Detention Limits for Aliens with a Final Order of Removal from the United States*, OIG-07-28, at 1 (Feb. 2007) (reporting ICE's failure to provide custody reviews in a timely manner and, in some cases, its failure to provide them at all; ICE's improper suspension of detainees from the review process; ICE's failure to provide sufficient guidance to its field offices on *Zadvydas*; non-uniform practices across field offices; and ICE's ineffective oversight efforts); Kathleen Glynn & Sarah Bronstein, *Systemic Problems Persist In U.S. ICE Custody Reviews for "Indefinite" Detainees*, at 1-2 (Catholic Legal Immigration Network, Inc. 2005) (reporting poor record keeping, failure to conduct timely custody reviews, staff shortages, lack of communication with and information provided to detainees, and non-uniform practices across field offices).

As *Zadvydas* makes clear, the inadequacy of the POOCR process implicates serious constitutional concerns as “[f]reedom from imprisonment—from government custody, detention, or other forms of restraint—lies at the heart of the liberty.” *Zadvydas*, 533 U.S. at 682, 690. Moreover, the issue of the POOCR process’ adequacy has become especially acute as the government exponentially increases its use of immigration detention and subjects increasing numbers of noncitizens to prolonged imprisonment.³

Public scrutiny of the POOCR process is therefore necessary to ensure the agency manages its detained population in a manner that is consistent with its statutory and constitutional obligations. While the reports on the POOCR to date are certainly useful, they are limited in scope, and none of the underlying agency records are readily available for review.⁴ Far more information is needed for a full review of POOCR process.

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RECORDS REQUESTED

Please disclose:

1. All records⁵ reflecting the following information for individuals who were detained six months or longer (hereinafter “prolonged detainees”) as of December 31, 2008:
 - a. The number of such detainees organized by field office.
 - b. The nationality of such detainees.
 - c. The length of such detainees’ detention.

³ For example, in 1997, the number of immigrants detained by the U.S. Immigration and Naturalization Service on any given day was approximately 13,000. U.S. Dep’t of Justice, Office of the Federal Detention Trustee, Detention Needs Assessment and Baseline Report: a Compendium of Federal Detention Statistics, *available at* <http://www.usdoj.gov/ofdt/>. Just ten years later, the national daily ICE detainee population had surpassed 30,000. Anna Gorman, *Immigration Detainees are at Record Levels*, L.A. Times, Nov. 5, 2007, at B1. See also OIG-07-28, at 1 (finding that ICE “is not well positioned to oversee the growing detention caseload that will be generated by DHS’ planned enhancements to secure the border.”).

⁴ For example, the OIG’s review did not address the “sufficiency of release decisions” and the “success of alternatives to detention,” and the study was also not designed to review ICE practices nationwide. See OIG-07-28, at 44. The CLINIC report was generated from interviews with practitioners lacking full and direct access to agency records.

⁵ See 5 U.S.C. § 552(2) (defining “record” as “(A) any information that would be an agency record subject to the requirements of this section when maintained by an agency in any format, including an electronic format; and (B) any information described under subparagraph (A) that is maintained for an agency by an entity under Government contract, for the purposes of records management.”).

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- d. The number of such detainees with an administratively final order of removal.
 - e. The number of such detainees with an administratively final order of removal that was judicially stayed.
 - f. The number of such detainees whose removal proceedings were pending before the Immigration Judge.
 - g. The number of such detainees whose removal proceedings were pending before the Board of Immigration Appeals.
 - h. The number of such detainees whose removal proceedings were pending before the Court of Appeals.
 - i. The number of such detainees whose removal proceedings were pending before the Immigration Judge or Board of Immigration Appeals on remand.
2. All 90-day and 180-day post-order custody review (POCR) decisions for prolonged detainees from November 1, 2007 onwards, organized per detainee.
3. All records reflecting the following information for prolonged detainees who were released from custody from November 14, 2001 onward because they won their removal cases:
 - a. The number of such detainees released per year.
 - b. The number of such detainees organized by field office.
 - c. The nationality of such detainees.
 - d. The length of such detainees' detention.
4. All 90-day and 180-day post-order custody review (POCR) decisions for prolonged detainees who were released from custody from November 14, 2001 onwards because they won their removal cases, organized per detainee
5. All records reflecting the following information for detainees who were released at their 90-day custody review from November 14, 2001 onward:
 - a. The number of such detainees per year.
 - b. The number of such detainees organized by field office.
 - c. The nationality of such detainees.
 - d. The number of such detainees with an administratively final order of removal that was judicially stayed, and the field office and nationality of such detainees
6. All records reflecting the following information for detainees who were detained six months or longer following the entry of an administratively final order of removal that was not judicially stayed (hereinafter "*Zadvydas* detainees") from November 14, 2001 onward.
 - a. The number of such detainees per year.
 - b. The number of such detainees organized by field office.
 - c. The nationality of such detainees.

- d. The length of such detainees' detention.
- 7. All 90-day and 180-day post-order custody review (POCRs) decisions for all *Zadvydas* detainees from November 14, 2001 onwards, organized per detainee.
- 8. All records reflecting the following information for all *Zadvydas* detainees who were removed from the United States from November 14, 2001 onward:
 - a. The number of such detainees per year.
 - b. The number of such detainees organized by field office.
 - c. The nationality of such detainees.
 - d. The length of such detainees' detention.
 - e. The length of such detainees' detention beyond the 90-day removal period.
- 9. All records reflecting the following information for all detainees with administratively final orders of removal that were not judicially stayed, and who were released from custody from November 14, 2001 onward because their removal was not significantly likely in the reasonably foreseeable future:
 - a. The number of such detainees released per year.
 - b. The number of such detainees released per year by field office.
 - c. The nationality of such detainees.
 - d. The length of such detainees' detention.
 - e. The length of such detainees' detention beyond the 90-day removal period..
 - f. The number of such detainees who filed petitions for writs of habeas corpus, and the case name and court where such petitions were filed.
 - g. The number of such detainees who were released pursuant to writs of habeas corpus.
 - h. The numbers of such detainees who are currently released on supervision orders.
 - i. The conditions of supervised release of such detainees, including but not limited to release notices and orders, supervision orders, Intensive Supervision and Appearance Program (ISAP) conditions, and Enhanced Supervision/Reporting (ESR) conditions.
- 10. All records related to DHS, ICE, Headquarters Post-Order Detention Unit (HQPDU), and individual ICE field office policies, procedures, and/or guidelines on POCRs and conditions of supervised release, including but not limited to manuals, guidances, instructions, policy statements, legal memoranda, training materials, and sample forms, worksheets, and letters.

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11. All records related to DHS, ICE, Headquarters Post-Order Detention Unit (HQPDU), and individual ICE field office policies, procedures, and/or guidelines regarding the detention, custody review, release, and conditions of supervision of noncitizens whose removal has been judicially stayed, including but not limited to manuals, guidances, instructions, policy statements, legal memoranda, training materials, and sample forms, worksheets, and letters.
12. All records and statistics compiled for the OIG's review of the POOR process, *ICE's Compliance with Detention Limits for Aliens with a Final Order of Removal from the United States*, OIG-07-28 (Feb. 2007).

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THE REQUESTOR

The ACLU is a nationwide, nonprofit, and nonpartisan organization dedicated to protecting civil rights and civil liberties in the United States. It is the largest civil liberties organization in the country, with offices in the 50 states and over 500,000 members. The ACLU is dedicated to holding the U.S. government accountable to principles of due process and the U.S. Constitution in general, including those principles that bear on detention and other significant deprivations of liberty.

The ACLU publishes newsletters, news briefings, right-to-know handbooks, and other materials that are widely disseminated to the public. These materials are made available to everyone—including tax-exempt organizations, non-profit groups, and law students and law faculty—for either no cost or for a nominal fee through its public education department.

The ACLU also disseminates information through its high-traffic website, <http://www.aclu.org>. The website provides in-depth information on a range of civil liberties issues; address civil liberties issues that are currently in the news; and contains hundreds of documents relating to the ACLU's work. The website also specifically features information obtained through the FOIA. See, e.g., <http://www.aclu.org/safefree/torture/torturefoia.html>; <http://www.aclu.org/patriot/foia/index.html>. The ACLU also publishes an electronic newsletter, which is distributed to subscribers via email; airs regular podcasts; and produces a television series on civil liberties issues entitled *The Freedom Files*. See <http://aclu.tv>.

Accordingly, the ACLU is an organization whose "main professional activity or occupation is information dissemination." 6 C.F.R. § 5.5(d)(3). The ACLU is also a "representative of the news media" within the meaning of the statute and applicable regulations. See 5 U.S.C. § 552(a)(4)(A)(iii).

(defining a representative of the news media as an entity that “gathers information of potential interest to a segment of the public” and “uses its editorial skills to turn raw materials into a distinct work, and distributes that work to an audience”); *see also National Sec. Archive v. U.S. Department of Defense*, 880 F.2d 1381, 1397 (D.C. Cir. 1989) (same); 45 C.F.R. § 5.5 (defining representative of the news media as “a person actively gathering information for an entity organized and operated to publish or broadcast news to the public”).

EXPEDITED PROCESSING

AMERICAN CIVIL LIBERTIES
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We request Track 1 expedited treatment for this FOIA request. This request qualifies for expedited treatment pursuant to 5 U.S.C. § 552(a)(6)(E) and applicable regulations. As set forth above, there is a “compelling need” for expedited processing of this request, *see* 5 U.S.C. § 552(a)(6)(E)(i)(I), namely, an “urgency to inform the public concerning the public concerning actual or alleged Federal Government activity.” 5 U.S.C. § 552(a)(6)(E)(v)(II); *see also* 6 C.F.R. § 5.5(d)(1)(ii) (same). The ACLU is therefore entitled to expedited processing of this request.

FEE WAIVER

The ACLU also requests a full fee waiver on the grounds that disclosure of the requested records is in the public interest and is “likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii); *see also* 45 C.F.R. § 5.45.

As set forth above, this request aims at furthering public understanding of government conduct: specifically, whether the post-order custody reviews for detainees in the custody of ICE are sufficient to satisfy the agency’s statutory and constitutional obligations. In this respect, the request strongly resembles the many previous instances in which government waived all fees associated with responding to FOIA requests by the ACLU.⁶

⁶ The following are recent examples of requests in which agencies did not charge the ACLU fees associated with responding to its FOIA requests: (1) a FOIA request submitted to the Department of State in April 2005; (2) a FOIA request submitted to the National Institute of Standards and Technology in April 2005; (3) a FOIA request submitted to the Office of Science and Technology in the Executive Office of the President in August 2003; (4) a FOIA request submitted to the Federal Bureau of Investigation in August 2002; (5) a FOIA request submitted to the Office of Intelligence Policy and Review in August 2002; (6) a FOIA request submitted to the Office of Information and Privacy in the Department of Justice in August 2002.

In any event, as discussed *supra*, the ACLU is a "representative of the news media" and does not seek the records requested for commercial use. Accordingly, should the government assess fees for the processing of this request, those fees should be "limited to reasonable standard charges for document duplication" alone. 5 U.S.C. § 552(a)(4)(A)(ii)(II).

* * *

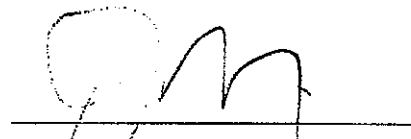
Thank you for your consideration of this request. If this request is denied in whole or in part, the ACLU asks that the government justify all redactions by reference to the specific exemptions of the FOIA. We expect that the government release all segregable portions of otherwise exempt material. We reserve the right to appeal a decision to withhold any information or to deny expedited processing or a waiver of fees. We look forward to your request to our request for expedited processing within ten (10) business days, as required under 5 U.S.C. § 552(a)(6)(E)(ii)(I). Notwithstanding our request for expedited processing, we alternatively look forward to your reply to this request within twenty (20) business days, as required under 5 U.S.C. § 552(a)(6)(A)(I).

AMERICAN CIVIL LIBERTIES
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Please respond to Judy Rabinovitz, Deputy Director, ACLU Immigrants' Rights Project, 125 Broad St., 18th Floor, New York, NY 10004, Tel: 212-549-2618, Email: jrabinovitz@aclu.org. Also, please notify us in advance if the cost of photocopying the documents requested exceed \$100.00.

* * *

Under penalty of perjury, I certify, to the best of my knowledge and belief, that the above information is true and correct.



Judy Rabinovitz
ACLU Immigrants' Rights Project
125 Broad St., 18th Floor
New York, NY 10004
Tel: 212-549-2618
Fax: 212-549-2654
Email: jrabinovitz@aclu.org

Exhibit B

U.S. Department of Homeland Security
800 North Capitol Street, NW, Suite 585
Washington, DC 20536



U.S. Immigration
and Customs
Enforcement

September 30, 2009

Judy Rabinovitz
ACLU Foundation – Immigrants' Rights Project
125 Broad Street, 18th Floor
New York, NY 10004

Re: **Freedom of Information Act Request #2009FOIA1238 & 2009FOIA3496**

Dear Ms. Rubinovitz:

This letter is the final response to your Freedom of Information Act (FOIA) requests, dated January 13, 2009 to the U.S. Department of Homeland Security (DHS), Office of Inspector General (OIG) and Immigration and Customs Enforcement (ICE), for records related to the Post-Order Custody Review Process. These responses are being combined due to their similar subject matter. Your request addressed to ICE was received in this office on January 14, 2009. The request addressed to OIG was referred to this office on May 21, 2009.

A search of the ICE Office of Detention and Removal Operations (DRO) for documents responsive to your request produced a total of 742 pages and 2 Excel Files responsive to items 1, 3, 6, 8, 9, 10, and 11 of your request. Of these pages, I have determined that portions of 242 pages are exempt from disclosure pursuant to FOIA Exemptions (b)(2)High, (b)(5), (b)(6), and (b)(7)(C).

DRO was unable to locate records responsive to items 2, 4, 5, and 7 of your request letter. The data requested under these items is not tracked in the DRO databases.

During our search for responsive records, we located 7 pages that originated within the U.S. Department of Justice, Executive Office for Immigration Review (EOIR). In addition, I believe EOIR may have records responsive to item 9(f) of your request letter. Therefore, I am referring your request to the FOIA Officer for EOIR, for processing and direct response to you. You may contact that office in writing at FOIA/PA Requests, 5107 Leesburg Pike, Suite 2600, Falls Church 22041 or via telephone at (703) 605-1297.

In response to item 12 of your request, the Office of Inspector General (OIG) provided the ICE FOIA office with 273 pages of responsive records as well as a CD containing the DACS Software Program. The DACS Software Program is being withheld in its entirety under FOIA Exemption (b)(2)High as described below. Portions of the other records are also being withheld as described below.

Portions of 242 pages as well as the DACS software program in its entirety are being withheld as described below.

FOIA Exemption 2(high) protects information applicable to internal administrative and personnel matters, such as operating rules, guidelines, and manual of procedures of examiners or adjudicators, to the extent that disclosure would risk circumvention of an agency regulation or statute, impede the effectiveness of an agency's activities, or reveal sensitive information that may put the security and safety of an agency activity or employee at risk. Whether there is any public interest in disclosure is legally irrelevant. Rather, the concern under high 2 is that a FOIA disclosure should not benefit those attempting to violate the law and avoid detection.

FOIA Exemption 5 protects from disclosure those inter- or intra-agency documents that are normally privileged in the civil discovery context. The three most frequently invoked privileges are the deliberative process privilege, the attorney work-product privilege, and the attorney-client privilege. After carefully reviewing the responsive documents, I determined that portions of the responsive documents qualify for protection under the Deliberative Process Privilege and the Attorney-Client Privilege.

- **Deliberative Process Privilege**

The deliberative process privilege protects the integrity of the deliberative or decision-making processes within the agency by exempting from mandatory disclosure opinions, conclusions, and recommendations included within inter-agency or intra-agency memoranda or letters. The release of this internal information would discourage the expression of candid opinions and inhibit the free and frank exchange of information among agency personnel.

- **Attorney-Client Privilege**

The attorney-client privilege protects confidential communications between an attorney and his client relating to a legal matter for which the client has sought professional advice. It applies to facts divulged by a client to his attorney, and encompasses any opinions given by an attorney to his client based upon, and thus reflecting, those facts, as well as communications between attorneys that reflect client-supplied information. The attorney-client privilege is not limited to the context of litigation.

FOIA Exemption 6 exempts from disclosure personnel or medical files and similar files the release of which would cause a clearly unwarranted invasion of personal privacy. This requires a balancing of the public's right to disclosure against the individual's right privacy. The types of documents and/or information that we have withheld may consist of social security numbers, home addresses, dates of birth, or various other documents and/or information belonging to a third party that are considered personal. The privacy interests of the individuals in the records you have requested outweigh any minimal public interest in disclosure of the information. Any private interest you may have in that information does not factor into the aforementioned balancing test.

FOIA Exemption 7(C) protects records or information compiled for law enforcement purposes that could reasonably be expected to constitute an unwarranted invasion of personal privacy. This exemption takes particular note of the strong interests of individuals, whether they are suspects, witnesses, or investigators, in not being unwarrantably associated with alleged criminal activity. That interest extends to persons who are not only the subjects of the investigation, but those who may have their privacy invaded by having their identities and information about them revealed in connection with an investigation. Based upon the traditional recognition of strong privacy interest in law enforcement records, categorical withholding of information that identifies third parties in law enforcement records is ordinarily appropriate. As such, I have determined that the privacy interest in the identities of individuals in the records you have requested clearly outweigh any minimal public interest in disclosure of the information. Please note that any private interest you may have in that information does not factor into this determination.

You have a right to appeal the above withholding determination. Should you wish to do so, you must send your appeal and a copy of this letter, within 60 days of the date of this letter, to: Associate General Counsel (General Law), U.S. Department of Homeland Security, Washington, D.C. 20528, following the procedures outlined in the DHS regulations at 6 C.F.R. § 5.9. Your envelope and letter should be marked "FOIA Appeal." Copies of the FOIA and DHS regulations are available at www.dhs.gov/foia.

If you need to contact our office about this matter, please refer to case number **2009FOIA1238**. This office can be reached at (202) 732-0300 or (866) 633-1182.

Sincerely,



Caitlin M. Pawlik-Keenan
FOIA Officer

Enclosure(s): 742 Pages, 2 Excel Files

Exhibit C

LEGAL DEPARTMENT
IMMIGRANTS'
RIGHTS PROJECT



November 20, 2009

Catrina-Pavlik-Keenan
FOIA Officer
U.S. Immigration and Customs Enforcement
800 North Capitol St., NW
5th Floor, Suite 585
Washington, D.C. 20536

RE: Freedom of Information Act Requests #2009FOIA1238 &
2009FOIA3496

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
IMMIGRANTS'
RIGHTS PROJECT

PLEASE RESPOND TO:
NATIONAL OFFICE
125 BROAD STREET, 18TH FL.
NEW YORK, NY 10004-2400
T/212.549.2660
F/212.549.2654
WWW.ACLU.ORG

CALIFORNIA OFFICE
39 DRUMM STREET
SAN FRANCISCO, CA 94111-4805
T/415.343.0770
F/415.395.0950

OFFICERS AND DIRECTORS
NADINE STROSSEN
PRESIDENT

ANTHONY D. ROMERO
EXECUTIVE DIRECTOR

RICHARD ZACKS
TREASURER

Dear Ms. Pavlik-Keenan:

I am writing to follow up on your letter of September 30, 2009, in which you provided us with certain documents in response to our FOIA requests of January 13, 2009. We have had an opportunity to review the documents and spreadsheets provided and would like to schedule a time to speak with you further. In particular, we would like to obtain clarification about certain files that were produced in order to confirm that they were truly responsive. In addition, we have questions about those requests for which no responsive documents were determined to be available.

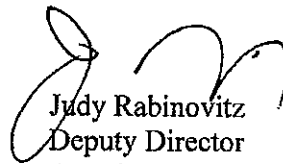
In advance of our conversation, we were hoping you could clarify several preliminary questions regarding the spreadsheets produced in response to questions 1, 3, 6, 8, and 9:

- 1) What is the definition of the term "final order" as it was used in creating these data files? Does the definition take into account judicial or other stays? And if not, how were you able to identify the detainees we labeled "Zadvydas detainees" in Questions 6 and 8 ("detainees who were detained six months or longer following the entry of an administratively final order of removal that was not judicially stayed"), as well as the additional detainees we identified in Question 9 who have "administrative removal orders that were not judicially stayed"?
- 2) What is the definition of the term "removed" that was used in creating the data produced in question 8? Does it mean "ordered removed" or does it mean "actually removed"?

- 3) What were each of the search queries that the Executive Information Unit used to create the data produced in response to questions 1, 3, 6, 8, and 9?

We appreciate your continued assistance with this FOIA request, and look forward to speaking with you.

Sincerely,



Judy Rabinovitz
Deputy Director
American Civil Liberties Union
Immigrants' Rights Project
125 Broad Street, 18th Floor
New York, NY 10004

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION

Cc: Catherine M. Papoi, FOIA Officer,
U.S. Department of Homeland Security

Exhibit D

-----Original Message-----

From: Fields, Jessica L
Sent: Monday, April 20, 2009 4:49 PM
To: Harrington, Paula L
Cc: Ivery, Ashly M
Subject: 09-1238 RE: DRAFT DRO Tasking - FOIA 06-1238

Sorry I realize that I sent the cleared response without the attachments.

-----Original Message-----

From: Ivery, Ashly M
Sent: Monday, April 20, 2009 4:14 PM
To: Fields, Jessica L
Cc: KIRK, Charles M
Subject: FW: 09-1238 RE: DRAFT DRO Tasking - FOIA 06-1238

Jessica,

For Clearance. Once cleared, forward to Paula Harrington

STU is unable to provide a response to questions
2,4,5,7,9,10,11,12 (Attachment 1)

STU is providing responses to questions 1,3,6 and 8 (Attachment
2)

Ashly M. Ivery
Chief
HQ/DRO/Enforcement Division
Executive Information Unit
Statistical Tracking
202 [REDACTED] office
202 [REDACTED] cellular
[REDACTED]

According to the Executive Information Unit there are 40,630 that have been released on an Order of Supervision from November 14, 2001 to December 31, 2008. Of that universe, DRO would have to analyze and breakdown the numbers much further in order to provide the required information. Further, once the true universe is determined, DRO would be required to request each Alien File in order to produce the majority of the documents request in this FOIA.

Please disclose:

1. All records reflecting the following information for individuals who were detained six months or longer (hereinafter "prolonged detainees") as of December 31, 2008: The information requested for questions a – c can be found in the attached excel document "Response Q1" organized by Field Office, country of citizenship, and length of detention.

- a. The number of such detainees organized by field office.
- b. The nationality of such detainees.
- c. The length of such detainees' detention.
- d. The number of such detainees with an administratively final order of removal. There were 20,732 final orders among the "prolonged detainees".
- e. The number of such detainees with an administratively final order of removal that was judicially stayed. Unable to determine which cases were judicially stayed by records in the database alone. DRO would be required to request each alien file in order to produce these documents.
- f. The number of such detainees whose removal proceedings were pending before the Immigration Judge. Unable to accurately determine this number, the database only indicates the current status of the records in question.
- g. The number of such detainees whose removal proceedings were pending before the Board of Immigration Appeals. Unable to accurately determine this number, the database only indicates the current status of the records in question.
- h. The number of such detainees whose removal proceedings were pending before the Court of Appeals. Unable to accurately determine this number. The database does not indicate if there was appeal to a Circuit Court.
- i. The number of such detainees whose removal proceedings were pending before the Immigration Judge or Board of Immigration Appeals on remand. This information is not available. It is held by the Executive Office of Immigration Review, with the department of justice.

2. All 90-day and 180-day post-order custody review (POCR) decisions for prolonged detainees from November 1, 2007 onwards, organized per detainee. Unable to produce without a full review of all files involved. The data requested concerning 90 and 180 day POCR releases is not tracked in the database.

3. All records reflecting the following information for prolonged detainees who were released from custody from November 14, 2001 onward because they won their removal cases: The information requested for questions a – d can be found in the attached document "Response Q3" and indicates how many prolonged detainees who "won" their cases and then were released each fiscal year. The criteria used to determine who "Won" their cases included those aliens who were granted adjustment to LPR Status, a waiver or cancelation, granted a benefit by CIS, or where their proceedings were terminated.

a. The number of such detainees released per year.

FY2002	FY2003	FY2004	FY2005	FY2006	FY2007	FY2008	FY2009 (YTD)
612	498	772	776	699	919	1,133	519

- b. The number of such detainees organized by field office.
- c. The nationality of such detainees.
- d. The length of such detainees' detention.

4. All 90-day and 180-day post-order custody review (POCR) decisions for prolonged detainees who were released from custody from November 14, 2001 onwards because they won their removal cases, organized per detainee Unable to produce without a full review of all files involved. The data requested concerning 90 and 180 day POCR releases is not tracked in the database.

5. All records reflecting the following information for detainees who were released at their 90-day custody review from November 14, 2001 onward:

- a. The number of such detainees per year. Unable to produce without a full review of all files involved. The data requested concerning 90 day POCR releases is not tracked in the database.
- b. The number of such detainees organized by field office. Unable to produce without a full review of all files involved. The data requested concerning 90 day POCR releases is not tracked in the database.
- c. The nationality of such detainees. Unable to produce without a full review of all files involved. The data requested concerning 90 day POCR releases is not tracked in the database.
- d. The number of such detainees with an administratively final order of removal that was judicially stayed, and the field office and nationality of such detainees Unable to produce without a full review of all files involved. The data requested concerning 90 day POCR releases is not tracked in the database.

6. All records reflecting the following information for detainees who were detained six months or longer following the entry of an administratively final order of removal that was not judicially stayed (hereinafter "Zadvydas detainees") from November 14, 2001 onward.

The information requested for questions b – d can be found in the attached excel document "Response Q6" organized by Field Office, country of citizenship, and length of detention, and date of book out.

- a. The number of such detainees per year.

FY2002	FY2003	FY2004	FY2005	FY2006	FY2007	FY2008	FY2009 (YTD)
230	401	653	695	227	230	110	5

- b. The number of such detainees organized by field office.
- c. The nationality of such detainees.
- d. The length of such detainees' detention.

7. All 90-day and 180-day post-order custody review (POCRs) decisions for all Zadvydas detainees from November 14, 2001 onwards, organized per detainee. Unable to produce without a full review of all files involved. The data requested concerning 90 and 180 day POCR releases is not tracked in the database.

8. All records reflecting the following information for all Zadvydas detainees who were removed from the United States from November 14, 2001 onward: The information requested for questions b – e can be found in the attached excel document "Response Q8" organized by Field Office, country of citizenship, and length of detention, and date of book out.

a. The number of such detainees per year.

FY2002	FY2003	FY2004	FY2005	FY2006	FY2007	FY2008	FY2009 (YTD)
1,243	2,448	3,850	4,216	2,883	2,977	855	222

b. The number of such detainees organized by field office.

c. The nationality of such detainees.

d. The length of such detainees' detention.

e. The length of such detainees' detention beyond the 90-day removal period.

9. All records reflecting the following information for all detainees with administratively final orders of removal that were not judicially stayed, and who were released from custody from November 14, 2001 onward because their removal was not significantly likely in the reasonably foreseeable future: Unable to answer this question as Judicial Stay information is not held in the system of record. DRO would be required to request each Alien File in order to produce these documents. This would require a large team of clerical staff to be detailed to a central location to request, and review the files. This would be a huge undertaking requiring months of clerical and appropriate officer and supervisory oversight staff to accomplish this huge undertaking.

a. The number of such detainees released per year. Unable to answer this portion of the question as Judicial Stay information is not held in the system of record.

b. The number of such detainees released per year by field office. Unable to answer this portion of the question as Judicial Stay information is not held in the system of record.

c. The nationality of such detainees. Unable to answer this portion of the question as Judicial Stay information is not held in the system of record.

d. The length of such detainees' detention. Unable to answer this portion of the question as Judicial Stay information is not held in the system of record.

e. The length of such detainees' detention beyond the 90-day removal period. Unable to answer this portion of the question as Judicial Stay information is not held in the system of record.

f. The number of such detainees who filed petitions for writs of habeas corpus, and the case name and court where such petitions were filed. Unable to answer this portion of the question as Judicial Stay information is not held in the system of record further habeas information is held by the Executive Office of Immigration Review (EOIR).

g. The number of such detainees who were released pursuant to writs of habeas corpus. Unable to answer this portion of the question as Judicial Stay information is not held in the system of record.

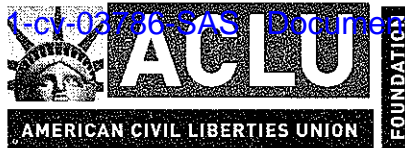
h. The numbers of such detainees who are currently released on supervision orders. Unable to answer this portion of the question as Judicial Stay information is not held in the system of record.

i. The conditions of supervised release of such detainees, including but not limited to release notices and orders, supervision orders, Intensive Supervision and Appearance Program (ISAP) conditions, and Enhanced Supervision/Reporting (ESR) conditions. This information is not tracked and only available by reviewing each individual file. DRO would be required to request each Alien File in order to produce these documents. This would require a large team of clerical staff to be detailed to a central location to request the files, review the files and copy all decisions in the file. This would be a huge undertaking requiring months of clerical and appropriate officer and supervisory oversight staff to accomplish this huge undertaking.

10. All records related to DHS, ICE, Headquarters Post-Order Detention Unit (HQPDU), and individual ICE field office policies, procedures, and/or guidelines on POCRs and conditions of supervised release, including but not limited to manuals, guidance, instructions, policy statements, legal memoranda, training materials, and sample forms, worksheets, and letters. These policies are not held by STU.

11. All records related to DHS, ICE, Headquarters Post-Order Detention Unit (HQPDU), and individual ICE field office policies, procedures, and/or guidelines regarding the detention, custody review, release, and conditions of supervision of noncitizens whose removal has been judicially stayed, including but not limited to manuals, guidance, instructions, policy statements, legal memoranda, training materials, and sample forms, worksheets, and letters. These policies are not held by STU.

12. All records and statistics compiled for the OIG's review of the POCR process, ICE's Compliance with Detention Limits for Aliens with a Final Order of Removal from the United States, OIG-07-28 (Feb. 2007). This was Deferred to Mark Matese's unit back in February.



November 20, 2009

Catrina-Pavlik-Keenan
FOIA Officer
U.S. Immigration and Customs Enforcement
800 North Capitol St., NW
5th Floor, Suite 585
Washington, D.C. 20536

RE: Freedom of Information Act Requests #2009FOIA1238 &
2009FOIA3496

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
IMMIGRANTS'
RIGHTS PROJECT

PLEASE RESPOND TO:
NATIONAL OFFICE
125 BROAD STREET, 18TH FL.
NEW YORK, NY 10004-2400
T/212.549.2660
F/212.549.2654
WWW.ACLU.ORG

CALIFORNIA OFFICE
39 DRUMM STREET
SAN FRANCISCO, CA 94111-4805
T/415.343.0770
F/415.395.0950

OFFICERS AND DIRECTORS
NADINE STROSSEN
PRESIDENT

ANTHONY D. ROMERO
EXECUTIVE DIRECTOR

RICHARD ZACKS
TREASURER

Dear Ms. Pavlik-Keenan:

I am writing to follow up on your letter of September 30, 2009, in which you provided us with certain documents in response to our FOIA requests of January 13, 2009. We have had an opportunity to review the documents and spreadsheets provided and would like to schedule a time to speak with you further. In particular, we would like to obtain clarification about certain files that were produced in order to confirm that they were truly responsive. In addition, we have questions about those requests for which no responsive documents were determined to be available.

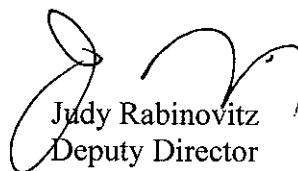
In advance of our conversation, we were hoping you could clarify several preliminary questions regarding the spreadsheets produced in response to questions 1, 3, 6, 8, and 9:

- 1) What is the definition of the term "final order" as it was used in creating these data files? Does the definition take into account judicial or other stays? And if not, how were you able to identify the detainees we labeled "Zadvydas detainees" in Questions 6 and 8 ("detainees who were detained six months or longer following the entry of an administratively final order of removal that was not judicially stayed"), as well as the additional detainees we identified in Question 9 who have "administrative removal orders that were not judicially stayed"?
- 2) What is the definition of the term "removed" that was used in creating the data produced in question 8? Does it mean "ordered removed" or does it mean "actually removed"?

- 3) What were each of the search queries that the Executive Information Unit used to create the data produced in response to questions 1, 3, 6, 8, and 9?

We appreciate your continued assistance with this FOIA request, and look forward to speaking with you.

Sincerely,



Judy Rabinovitz
Deputy Director
American Civil Liberties Union
Immigrants' Rights Project
125 Broad Street, 18th Floor
New York, NY 10004

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION

Cc: Catherine M. Papoi, FOIA Officer,
U.S. Department of Homeland Security

EXHIBIT I



November 30, 2009

Associate General Counsel (General Law)
Department of Homeland Security
Washington, D.C. 20528

**RE: FOIA Case Number 2009-FOIA-1238 & 2009 FOIA3496
Freedom of Information Act / Privacy Act Appeal to ICE**

Dear Associate General Counsel:

Pursuant to 6 C.F.R. § 5.9, the American Civil Liberties Union (ACLU) appeals U.S. Immigration and Customs Enforcement's (ICE) final response to its request under the Freedom of Information Act (FOIA).

The ACLU's FOIA request seeks records related to the post-order custody review (POCR) process that the Department of Homeland Security (DHS) applies to detained non-citizens with administratively final orders of removal. *See* ACLU FOIA Request, dated Jan. 13, 2009, attached as Exh. A. In a letter dated September 30, 2009, ICE provided a partial response to the request. Specifically, ICE provided some documents in response to items 1, 3, 6, 8, 9, 10, and 11, while redacting from disclosure certain of these documents under exemptions (b)(2), (b)(5), (b)(6), and (b)(7)(C). ICE stated that it was unable to locate any records responsive to items 2, 4, 5, and 7 of our request on the ground that these items are not tracked in DRO databases. *See* Pavlik-Keenan Letter, dated Sept. 30, 2009, at Para. 3, attached as Exh. B.

ICE's response to the FOIA request is inadequate for the following reasons:

First, it is unclear if certain of the documents provided are truly responsive. *See* Judy Rabinovitz Letter, dated November 20, 2009, attached as Exh. C. (requesting clarification as to database search queries that produced the allegedly responsive documents). For example, the response purports to provide data pertaining to detainees whose removal orders have been judicially stayed (as requested in items 6, 8, and 9). Yet a document released as part of the response states that ICE is "unable to determine which cases were judicially stayed by records in the database alone." *See* Memo from Jessica Fields, dated April 20, 2009, at p. 2, Item 1.e, attached as Exhibit D,

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
IMMIGRANTS'
RIGHTS PROJECT

PLEASE RESPOND TO:
NATIONAL OFFICE
125 BROAD STREET, 18TH FL.
NEW YORK, NY 10004-2400
T/212.549.2660
F/212.549.2654
WWW.ACLU.ORG

CALIFORNIA OFFICE
39 DRUMM STREET
SAN FRANCISCO, CA 94111-4805
T/415.343.0770
F/415.395.0950

OFFICERS AND DIRECTORS
NADINE STROSSEN
PRESIDENT

ANTHONY D. ROMERO
EXECUTIVE DIRECTOR

RICHARD ZACKS
TREASURER

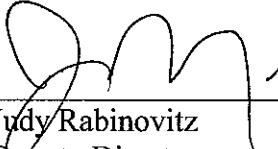
Second, the response is incomplete and does not reflect the kind of adequate search that FOIA contemplates. No response is provided for items 2, 4, 5 and 7, and only a partial response is provided to the other items. It appears that ICE confined its search to DRO databases rather than searching for responsive documents apart from such databases. *See, e.g.,* Exhibit B, at para. 3, stating that DRO was unable to locate records responsive to these items since “the data requested under these items is not traced in the DRO databases.” This is insufficient to satisfy the requirement of a “reasonable effort” under 5 U.S.C. § 552(a)(3)(B)-(C).

Finally, petitioners seek review of the exemptions invoked by ICE as a basis for redacting certain documents.

Pursuant to 5 U.S.C. § 552(a)(6)(A)(ii), we expect a response within the twenty (20) day statutory time limit. If you have any questions in processing this request, I can be contacted by mail at the address below or by telephone at (212) 549-2618.

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION

Sincerely,



Judy Rabinovitz
Deputy Director
ACLU Immigrants' Rights Project
125 Broad St., 18th Floor
New York, NY 10004
Tel: 212-549-2618
Fax: 212-549-2654
Email: jrabinovitz@aclu.org

CC: Catrina Pavlik-Keenan
FOIA Officer
U.S. Immigration and Customs Enforcement
800 North Capitol St., NW
5th Floor, Suite 585
Washington, DC 20528

Exhibit A

LEGAL DEPARTMENT
IMMIGRANTS'
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January 13, 2009

Catrina Pavlik-Keenan
FOIA Officer
U.S. Immigration and Customs Enforcement
800 North Capitol St., NW
5th Floor, Suite 585
Washington, DC 20528

Katherine Gallo
FOIA Officer
Office of the Inspector General
245 Murray Drive, Bldg. 410
Mail Stop 2600
Washington, DC 20528-0001

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PRESIDENT

ANTHONY D. ROMERO
EXECUTIVE DIRECTOR

RICHARD ZACKS
TREASURER

Catherine M. Papoi
FOIA Officer
U.S. Department of Homeland Security
Privacy Office
Director, Disclosure & FOIA
245 Murray Drive SW, Bldg. 410
Mail Stop 0550
Washington, DC 20528-0550

**RE: FOIA Request for Records Related to the Post-Order Custody
Review Process (POCR)**

Dear Freedom of Information Officers:

This letter constitutes a request pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, submitted on behalf of the Immigrants' Rights Project (IRP) of the American Civil Liberties Union (ACLU). The IRP is also requesting the expedited processing of this request, pursuant to 5 U.S.C. § 552(a)(6)(E) and agency regulations, and a fee waiver, pursuant to 5 U.S.C. § 552(a)(4)(A)(iii). This request is being simultaneously filed with the U.S. Immigration and Customs Enforcement (ICE), the Office of the Inspector General, and the U.S. Department of Homeland Security (DHS).

BACKGROUND

In 2001, the Supreme Court held that, under the Immigration and Nationality Act, 8 U.S.C. § 1231, a noncitizen with a final order of removal can only be

detained for the period reasonably necessary to effectuate his or her removal from the United States. The Court also found six months from the date of a final order of removal to be a presumptively reasonable period of time. *See Zadvydas v. Davis*, 533 U.S. 678, 701 (2001). Regulations designed to implement *Zadvydas* were promulgated in November 2001.¹ These regulations established a set of post-order custody review (POCR) procedures for determining, *inter alia*, whether an individual detainee will be detained or released following the 90 day removal period, *see* 8 C.F.R. § 241.4, and whether there is a significant likelihood of removal in the reasonably foreseeable future. *See* 8 C.F.R. § 241.13.

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Since its establishment, however, immigrants' rights advocates and government oversight bodies alike have expressed serious concerns about the POCR process' adequacy. Reviews of the POCR process strongly suggest that it does not afford meaningful, fair, and individualized review to prolonged immigration detainees and that ICE officials are not making appropriate determinations as to release or continued detention.²

Moreover, the government is currently applying the POCR procedure to noncitizens whose removal orders have been judicially stayed pending adjudication of their immigration appeals, even though the regulations are silent as to these individuals. Immigration law practitioners regularly report that the government appears to treat the existence of a stay as a *per se* basis for denying release, on the grounds that individuals with stays are inherent flight risks.

¹ *See* Continued Detention of Aliens Subject to Final Orders of Removal, 66 Fed. Reg. 56967 (Nov. 14, 2001) codified at 8 C.F.R. §§ 241.4, 241.13, 241.14.

² *See, e.g.*, General Accounting Office, *Better Data and Controls Are Needed to Assure Consistency with the Supreme Court Decision on Long-Term Alien Detention*, GAO-04-434 (May 2004) (finding that ICE's database could not even identify the detainees entitled to a custody review and that ICE was possibly violating POCR regulations); Dep't of Homeland Security Office of the Inspector General, *ICE's Compliance with Detention Limits for Aliens with a Final Order of Removal from the United States*, OIG-07-28, at 1 (Feb. 2007) (reporting ICE's failure to provide custody reviews in a timely manner and, in some cases, its failure to provide them at all; ICE's improper suspension of detainees from the review process; ICE's failure to provide sufficient guidance to its field offices on *Zadvydas*; non-uniform practices across field offices; and ICE's ineffective oversight efforts); Kathleen Glynn & Sarah Bronstein, *Systemic Problems Persist In U.S. ICE Custody Reviews for "Indefinite" Detainees*, at 1-2 (Catholic Legal Immigration Network, Inc. 2005) (reporting poor record keeping, failure to conduct timely custody reviews, staff shortages, lack of communication with and information provided to detainees, and non-uniform practices across field offices).

As *Zadvydas* makes clear, the inadequacy of the POOCR process implicates serious constitutional concerns as “[f]reedom from imprisonment—from government custody, detention, or other forms of restraint—lies at the heart of the liberty.” *Zadvydas*, 533 U.S. at 682, 690. Moreover, the issue of the POOCR process’ adequacy has become especially acute as the government exponentially increases its use of immigration detention and subjects increasing numbers of noncitizens to prolonged imprisonment.³

Public scrutiny of the POOCR process is therefore necessary to ensure the agency manages its detained population in a manner that is consistent with its statutory and constitutional obligations. While the reports on the POOCR to date are certainly useful, they are limited in scope, and none of the underlying agency records are readily available for review.⁴ Far more information is needed for a full review of POOCR process.

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RECORDS REQUESTED

Please disclose:

1. All records⁵ reflecting the following information for individuals who were detained six months or longer (hereinafter “prolonged detainees”) as of December 31, 2008:
 - a. The number of such detainees organized by field office.
 - b. The nationality of such detainees.
 - c. The length of such detainees’ detention.

³ For example, in 1997, the number of immigrants detained by the U.S. Immigration and Naturalization Service on any given day was approximately 13,000. U.S. Dep’t of Justice, Office of the Federal Detention Trustee, Detention Needs Assessment and Baseline Report: a Compendium of Federal Detention Statistics, *available at* <http://www.usdoj.gov/ofdt/>. Just ten years later, the national daily ICE detainee population had surpassed 30,000. Anna Gorman, *Immigration Detainees are at Record Levels*, L.A. Times, Nov. 5, 2007, at B1. See also OIG-07-28, at 1 (finding that ICE “is not well positioned to oversee the growing detention caseload that will be generated by DHS’ planned enhancements to secure the border.”).

⁴ For example, the OIG’s review did not address the “sufficiency of release decisions” and the “success of alternatives to detention,” and the study was also not designed to review ICE practices nationwide. See OIG-07-28, at 44. The CLINIC report was generated from interviews with practitioners lacking full and direct access to agency records.

⁵ See 5 U.S.C. § 552(2) (defining “record” as “(A) any information that would be an agency record subject to the requirements of this section when maintained by an agency in any format, including an electronic format; and (B) any information described under subparagraph (A) that is maintained for an agency by an entity under Government contract, for the purposes of records management.”).

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- d. The number of such detainees with an administratively final order of removal.
 - e. The number of such detainees with an administratively final order of removal that was judicially stayed.
 - f. The number of such detainees whose removal proceedings were pending before the Immigration Judge.
 - g. The number of such detainees whose removal proceedings were pending before the Board of Immigration Appeals.
 - h. The number of such detainees whose removal proceedings were pending before the Court of Appeals.
 - i. The number of such detainees whose removal proceedings were pending before the Immigration Judge or Board of Immigration Appeals on remand.
2. All 90-day and 180-day post-order custody review (POCR) decisions for prolonged detainees from November 1, 2007 onwards, organized per detainee.
3. All records reflecting the following information for prolonged detainees who were released from custody from November 14, 2001 onward because they won their removal cases:
 - a. The number of such detainees released per year.
 - b. The number of such detainees organized by field office.
 - c. The nationality of such detainees.
 - d. The length of such detainees' detention.
4. All 90-day and 180-day post-order custody review (POCR) decisions for prolonged detainees who were released from custody from November 14, 2001 onwards because they won their removal cases, organized per detainee
5. All records reflecting the following information for detainees who were released at their 90-day custody review from November 14, 2001 onward:
 - a. The number of such detainees per year.
 - b. The number of such detainees organized by field office.
 - c. The nationality of such detainees.
 - d. The number of such detainees with an administratively final order of removal that was judicially stayed, and the field office and nationality of such detainees
6. All records reflecting the following information for detainees who were detained six months or longer following the entry of an administratively final order of removal that was not judicially stayed (hereinafter "*Zadvydas* detainees") from November 14, 2001 onward.
 - a. The number of such detainees per year.
 - b. The number of such detainees organized by field office.
 - c. The nationality of such detainees.

- d. The length of such detainees' detention.
- 7. All 90-day and 180-day post-order custody review (POCRs) decisions for all *Zadvydas* detainees from November 14, 2001 onwards, organized per detainee.
- 8. All records reflecting the following information for all *Zadvydas* detainees who were removed from the United States from November 14, 2001 onward:
 - a. The number of such detainees per year.
 - b. The number of such detainees organized by field office.
 - c. The nationality of such detainees.
 - d. The length of such detainees' detention.
 - e. The length of such detainees' detention beyond the 90-day removal period.
- 9. All records reflecting the following information for all detainees with administratively final orders of removal that were not judicially stayed, and who were released from custody from November 14, 2001 onward because their removal was not significantly likely in the reasonably foreseeable future:
 - a. The number of such detainees released per year.
 - b. The number of such detainees released per year by field office.
 - c. The nationality of such detainees.
 - d. The length of such detainees' detention.
 - e. The length of such detainees' detention beyond the 90-day removal period..
 - f. The number of such detainees who filed petitions for writs of habeas corpus, and the case name and court where such petitions were filed.
 - g. The number of such detainees who were released pursuant to writs of habeas corpus.
 - h. The numbers of such detainees who are currently released on supervision orders.
 - i. The conditions of supervised release of such detainees, including but not limited to release notices and orders, supervision orders, Intensive Supervision and Appearance Program (ISAP) conditions, and Enhanced Supervision/Reporting (ESR) conditions.
- 10. All records related to DHS, ICE, Headquarters Post-Order Detention Unit (HQPDU), and individual ICE field office policies, procedures, and/or guidelines on POCRs and conditions of supervised release, including but not limited to manuals, guidances, instructions, policy statements, legal memoranda, training materials, and sample forms, worksheets, and letters.

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11. All records related to DHS, ICE, Headquarters Post-Order Detention Unit (HQPDU), and individual ICE field office policies, procedures, and/or guidelines regarding the detention, custody review, release, and conditions of supervision of noncitizens whose removal has been judicially stayed, including but not limited to manuals, guidances, instructions, policy statements, legal memoranda, training materials, and sample forms, worksheets, and letters.
12. All records and statistics compiled for the OIG's review of the POOR process, *ICE's Compliance with Detention Limits for Aliens with a Final Order of Removal from the United States*, OIG-07-28 (Feb. 2007).

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THE REQUESTOR

The ACLU is a nationwide, nonprofit, and nonpartisan organization dedicated to protecting civil rights and civil liberties in the United States. It is the largest civil liberties organization in the country, with offices in the 50 states and over 500,000 members. The ACLU is dedicated to holding the U.S. government accountable to principles of due process and the U.S. Constitution in general, including those principles that bear on detention and other significant deprivations of liberty.

The ACLU publishes newsletters, news briefings, right-to-know handbooks, and other materials that are widely disseminated to the public. These materials are made available to everyone—including tax-exempt organizations, non-profit groups, and law students and law faculty—for either no cost or for a nominal fee through its public education department.

The ACLU also disseminates information through its high-traffic website, <http://www.aclu.org>. The website provides in-depth information on a range of civil liberties issues; address civil liberties issues that are currently in the news; and contains hundreds of documents relating to the ACLU's work. The website also specifically features information obtained through the FOIA. See, e.g., <http://www.aclu.org/safefree/torture/torturefoia.html>; <http://www.aclu.org/patriot/foia/index.html>. The ACLU also publishes an electronic newsletter, which is distributed to subscribers via email; airs regular podcasts; and produces a television series on civil liberties issues entitled *The Freedom Files*. See <http://aclu.tv>.

Accordingly, the ACLU is an organization whose "main professional activity or occupation is information dissemination." 6 C.F.R. § 5.5(d)(3). The ACLU is also a "representative of the news media" within the meaning of the statute and applicable regulations. See 5 U.S.C. § 552(a)(4)(A)(iii).

(defining a representative of the news media as an entity that “gathers information of potential interest to a segment of the public” and “uses its editorial skills to turn raw materials into a distinct work, and distributes that work to an audience”); *see also National Sec. Archive v. U.S. Department of Defense*, 880 F.2d 1381, 1397 (D.C. Cir. 1989) (same); 45 C.F.R. § 5.5 (defining representative of the news media as “a person actively gathering information for an entity organized and operated to publish or broadcast news to the public”).

EXPEDITED PROCESSING

AMERICAN CIVIL LIBERTIES
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We request Track 1 expedited treatment for this FOIA request. This request qualifies for expedited treatment pursuant to 5 U.S.C. § 552(a)(6)(E) and applicable regulations. As set forth above, there is a “compelling need” for expedited processing of this request, *see* 5 U.S.C. § 552(a)(6)(E)(i)(I), namely, an “urgency to inform the public concerning the public concerning actual or alleged Federal Government activity.” 5 U.S.C. § 552(a)(6)(E)(v)(II); *see also* 6 C.F.R. § 5.5(d)(1)(ii) (same). The ACLU is therefore entitled to expedited processing of this request.

FEE WAIVER

The ACLU also requests a full fee waiver on the grounds that disclosure of the requested records is in the public interest and is “likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii); *see also* 45 C.F.R. § 5.45.

As set forth above, this request aims at furthering public understanding of government conduct: specifically, whether the post-order custody reviews for detainees in the custody of ICE are sufficient to satisfy the agency’s statutory and constitutional obligations. In this respect, the request strongly resembles the many previous instances in which government waived all fees associated with responding to FOIA requests by the ACLU.⁶

⁶ The following are recent examples of requests in which agencies did not charge the ACLU fees associated with responding to its FOIA requests: (1) a FOIA request submitted to the Department of State in April 2005; (2) a FOIA request submitted to the National Institute of Standards and Technology in April 2005; (3) a FOIA request submitted to the Office of Science and Technology in the Executive Office of the President in August 2003; (4) a FOIA request submitted to the Federal Bureau of Investigation in August 2002; (5) a FOIA request submitted to the Office of Intelligence Policy and Review in August 2002; (6) a FOIA request submitted to the Office of Information and Privacy in the Department of Justice in August 2002.

In any event, as discussed *supra*, the ACLU is a "representative of the news media" and does not seek the records requested for commercial use. Accordingly, should the government assess fees for the processing of this request, those fees should be "limited to reasonable standard charges for document duplication" alone. 5 U.S.C. § 552(a)(4)(A)(ii)(II).

* * *

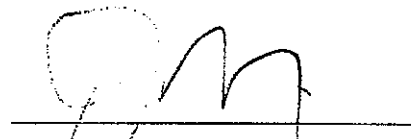
Thank you for your consideration of this request. If this request is denied in whole or in part, the ACLU asks that the government justify all redactions by reference to the specific exemptions of the FOIA. We expect that the government release all segregable portions of otherwise exempt material. We reserve the right to appeal a decision to withhold any information or to deny expedited processing or a waiver of fees. We look forward to your request to our request for expedited processing within ten (10) business days, as required under 5 U.S.C. § 552(a)(6)(E)(ii)(I). Notwithstanding our request for expedited processing, we alternatively look forward to your reply to this request within twenty (20) business days, as required under 5 U.S.C. § 552(a)(6)(A)(I).

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Please respond to Judy Rabinovitz, Deputy Director, ACLU Immigrants' Rights Project, 125 Broad St., 18th Floor, New York, NY 10004, Tel: 212-549-2618, Email: jrabinovitz@aclu.org. Also, please notify us in advance if the cost of photocopying the documents requested exceed \$100.00.

* * *

Under penalty of perjury, I certify, to the best of my knowledge and belief, that the above information is true and correct.



Judy Rabinovitz
ACLU Immigrants' Rights Project
125 Broad St., 18th Floor
New York, NY 10004
Tel: 212-549-2618
Fax: 212-549-2654
Email: jrabinovitz@aclu.org

Exhibit B

U.S. Department of Homeland Security
800 North Capitol Street, NW, Suite 585
Washington, DC 20536



U.S. Immigration
and Customs
Enforcement

September 30, 2009

Judy Rabinovitz
ACLU Foundation – Immigrants' Rights Project
125 Broad Street, 18th Floor
New York, NY 10004

Re: **Freedom of Information Act Request #2009FOIA1238 & 2009FOIA3496**

Dear Ms. Rubinovitz:

This letter is the final response to your Freedom of Information Act (FOIA) requests, dated January 13, 2009 to the U.S. Department of Homeland Security (DHS), Office of Inspector General (OIG) and Immigration and Customs Enforcement (ICE), for records related to the Post-Order Custody Review Process. These responses are being combined due to their similar subject matter. Your request addressed to ICE was received in this office on January 14, 2009. The request addressed to OIG was referred to this office on May 21, 2009.

A search of the ICE Office of Detention and Removal Operations (DRO) for documents responsive to your request produced a total of 742 pages and 2 Excel Files responsive to items 1, 3, 6, 8, 9, 10, and 11 of your request. Of these pages, I have determined that portions of 242 pages are exempt from disclosure pursuant to FOIA Exemptions (b)(2)High, (b)(5), (b)(6), and (b)(7)(C).

DRO was unable to locate records responsive to items 2, 4, 5, and 7 of your request letter. The data requested under these items is not tracked in the DRO databases.

During our search for responsive records, we located 7 pages that originated within the U.S. Department of Justice, Executive Office for Immigration Review (EOIR). In addition, I believe EOIR may have records responsive to item 9(f) of your request letter. Therefore, I am referring your request to the FOIA Officer for EOIR, for processing and direct response to you. You may contact that office in writing at FOIA/PA Requests, 5107 Leesburg Pike, Suite 2600, Falls Church 22041 or via telephone at (703) 605-1297.

In response to item 12 of your request, the Office of Inspector General (OIG) provided the ICE FOIA office with 273 pages of responsive records as well as a CD containing the DACS Software Program. The DACS Software Program is being withheld in its entirety under FOIA Exemption (b)(2)High as described below. Portions of the other records are also being withheld as described below.

Portions of 242 pages as well as the DACS software program in its entirety are being withheld as described below.

FOIA Exemption 2(high) protects information applicable to internal administrative and personnel matters, such as operating rules, guidelines, and manual of procedures of examiners or adjudicators, to the extent that disclosure would risk circumvention of an agency regulation or statute, impede the effectiveness of an agency's activities, or reveal sensitive information that may put the security and safety of an agency activity or employee at risk. Whether there is any public interest in disclosure is legally irrelevant. Rather, the concern under high 2 is that a FOIA disclosure should not benefit those attempting to violate the law and avoid detection.

FOIA Exemption 5 protects from disclosure those inter- or intra-agency documents that are normally privileged in the civil discovery context. The three most frequently invoked privileges are the deliberative process privilege, the attorney work-product privilege, and the attorney-client privilege. After carefully reviewing the responsive documents, I determined that portions of the responsive documents qualify for protection under the Deliberative Process Privilege and the Attorney-Client Privilege.

- **Deliberative Process Privilege**

The deliberative process privilege protects the integrity of the deliberative or decision-making processes within the agency by exempting from mandatory disclosure opinions, conclusions, and recommendations included within inter-agency or intra-agency memoranda or letters. The release of this internal information would discourage the expression of candid opinions and inhibit the free and frank exchange of information among agency personnel.

- **Attorney-Client Privilege**

The attorney-client privilege protects confidential communications between an attorney and his client relating to a legal matter for which the client has sought professional advice. It applies to facts divulged by a client to his attorney, and encompasses any opinions given by an attorney to his client based upon, and thus reflecting, those facts, as well as communications between attorneys that reflect client-supplied information. The attorney-client privilege is not limited to the context of litigation.

FOIA Exemption 6 exempts from disclosure personnel or medical files and similar files the release of which would cause a clearly unwarranted invasion of personal privacy. This requires a balancing of the public's right to disclosure against the individual's right privacy. The types of documents and/or information that we have withheld may consist of social security numbers, home addresses, dates of birth, or various other documents and/or information belonging to a third party that are considered personal. The privacy interests of the individuals in the records you have requested outweigh any minimal public interest in disclosure of the information. Any private interest you may have in that information does not factor into the aforementioned balancing test.

FOIA Exemption 7(C) protects records or information compiled for law enforcement purposes that could reasonably be expected to constitute an unwarranted invasion of personal privacy. This exemption takes particular note of the strong interests of individuals, whether they are suspects, witnesses, or investigators, in not being unwarrantably associated with alleged criminal activity. That interest extends to persons who are not only the subjects of the investigation, but those who may have their privacy invaded by having their identities and information about them revealed in connection with an investigation. Based upon the traditional recognition of strong privacy interest in law enforcement records, categorical withholding of information that identifies third parties in law enforcement records is ordinarily appropriate. As such, I have determined that the privacy interest in the identities of individuals in the records you have requested clearly outweigh any minimal public interest in disclosure of the information. Please note that any private interest you may have in that information does not factor into this determination.

You have a right to appeal the above withholding determination. Should you wish to do so, you must send your appeal and a copy of this letter, within 60 days of the date of this letter, to: Associate General Counsel (General Law), U.S. Department of Homeland Security, Washington, D.C. 20528, following the procedures outlined in the DHS regulations at 6 C.F.R. § 5.9. Your envelope and letter should be marked "FOIA Appeal." Copies of the FOIA and DHS regulations are available at www.dhs.gov/foia.

If you need to contact our office about this matter, please refer to case number **2009FOIA1238**. This office can be reached at (202) 732-0300 or (866) 633-1182.

Sincerely,



Caitlin M. Pawlik-Keenan
FOIA Officer

Enclosure(s): 742 Pages, 2 Excel Files

Exhibit C

LEGAL DEPARTMENT
IMMIGRANTS'
RIGHTS PROJECT



November 20, 2009

Catrina-Pavlik-Keenan
FOIA Officer
U.S. Immigration and Customs Enforcement
800 North Capitol St., NW
5th Floor, Suite 585
Washington, D.C. 20536

RE: Freedom of Information Act Requests #2009FOIA1238 &
2009FOIA3496

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OFFICERS AND DIRECTORS
NADINE STROSSEN
PRESIDENT

ANTHONY D. ROMERO
EXECUTIVE DIRECTOR

RICHARD ZACKS
TREASURER

Dear Ms. Pavlik-Keenan:

I am writing to follow up on your letter of September 30, 2009, in which you provided us with certain documents in response to our FOIA requests of January 13, 2009. We have had an opportunity to review the documents and spreadsheets provided and would like to schedule a time to speak with you further. In particular, we would like to obtain clarification about certain files that were produced in order to confirm that they were truly responsive. In addition, we have questions about those requests for which no responsive documents were determined to be available.

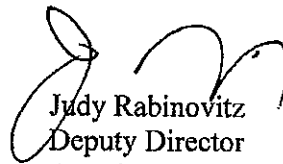
In advance of our conversation, we were hoping you could clarify several preliminary questions regarding the spreadsheets produced in response to questions 1, 3, 6, 8, and 9:

- 1) What is the definition of the term "final order" as it was used in creating these data files? Does the definition take into account judicial or other stays? And if not, how were you able to identify the detainees we labeled "Zadvydas detainees" in Questions 6 and 8 ("detainees who were detained six months or longer following the entry of an administratively final order of removal that was not judicially stayed"), as well as the additional detainees we identified in Question 9 who have "administrative removal orders that were not judicially stayed"?
- 2) What is the definition of the term "removed" that was used in creating the data produced in question 8? Does it mean "ordered removed" or does it mean "actually removed"?

- 3) What were each of the search queries that the Executive Information Unit used to create the data produced in response to questions 1, 3, 6, 8, and 9?

We appreciate your continued assistance with this FOIA request, and look forward to speaking with you.

Sincerely,



Judy Rabinovitz
Deputy Director
American Civil Liberties Union
Immigrants' Rights Project
125 Broad Street, 18th Floor
New York, NY 10004

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION

Cc: Catherine M. Papoi, FOIA Officer,
U.S. Department of Homeland Security

Exhibit D

-----Original Message-----

From: Fields, Jessica L
Sent: Monday, April 20, 2009 4:49 PM
To: Harrington, Paula L
Cc: Ivery, Ashly M
Subject: 09-1238 RE: DRAFT DRO Tasking - FOIA 06-1238

Sorry I realize that I sent the cleared response without the attachments.

-----Original Message-----

From: Ivery, Ashly M
Sent: Monday, April 20, 2009 4:14 PM
To: Fields, Jessica L
Cc: KIRK, Charles M
Subject: FW: 09-1238 RE: DRAFT DRO Tasking - FOIA 06-1238

Jessica,

For Clearance. Once cleared, forward to Paula Harrington

STU is unable to provide a response to questions
2,4,5,7,9,10,11,12 (Attachment 1)

STU is providing responses to questions 1,3,6 and 8 (Attachment
2)

Ashly M. Ivery
Chief
HQ/DRO/Enforcement Division
Executive Information Unit
Statistical Tracking
202 [REDACTED] office
202 [REDACTED] cellular
[REDACTED]

According to the Executive Information Unit there are 40,630 that have been released on an Order of Supervision from November 14, 2001 to December 31, 2008. Of that universe, DRO would have to analyze and breakdown the numbers much further in order to provide the required information. Further, once the true universe is determined, DRO would be required to request each Alien File in order to produce the majority of the documents request in this FOIA.

Please disclose:

1. All records reflecting the following information for individuals who were detained six months or longer (hereinafter "prolonged detainees") as of December 31, 2008: The information requested for questions a – c can be found in the attached excel document "Response Q1" organized by Field Office, country of citizenship, and length of detention.

- a. The number of such detainees organized by field office.
- b. The nationality of such detainees.
- c. The length of such detainees' detention.
- d. The number of such detainees with an administratively final order of removal. There were 20,732 final orders among the "prolonged detainees".
- e. The number of such detainees with an administratively final order of removal that was judicially stayed. Unable to determine which cases were judicially stayed by records in the database alone. DRO would be required to request each alien file in order to produce these documents.
- f. The number of such detainees whose removal proceedings were pending before the Immigration Judge. Unable to accurately determine this number, the database only indicates the current status of the records in question.
- g. The number of such detainees whose removal proceedings were pending before the Board of Immigration Appeals. Unable to accurately determine this number, the database only indicates the current status of the records in question.
- h. The number of such detainees whose removal proceedings were pending before the Court of Appeals. Unable to accurately determine this number. The database does not indicate if there was appeal to a Circuit Court.
- i. The number of such detainees whose removal proceedings were pending before the Immigration Judge or Board of Immigration Appeals on remand. This information is not available. It is held by the Executive Office of Immigration Review, with the department of justice.

2. All 90-day and 180-day post-order custody review (POCR) decisions for prolonged detainees from November 1, 2007 onwards, organized per detainee. Unable to produce without a full review of all files involved. The data requested concerning 90 and 180 day POCR releases is not tracked in the database.

3. All records reflecting the following information for prolonged detainees who were released from custody from November 14, 2001 onward because they won their removal cases: The information requested for questions a – d can be found in the attached document "Response Q3" and indicates how many prolonged detainees who "won" their cases and then were released each fiscal year. The criteria used to determine who "Won" their cases included those aliens who were granted adjustment to LPR Status, a waiver or cancelation, granted a benefit by CIS, or where their proceedings were terminated.

a. The number of such detainees released per year.

FY2002	FY2003	FY2004	FY2005	FY2006	FY2007	FY2008	FY2009 (YTD)
612	498	772	776	699	919	1,133	519

- b. The number of such detainees organized by field office.
- c. The nationality of such detainees.
- d. The length of such detainees' detention.

4. All 90-day and 180-day post-order custody review (POCR) decisions for prolonged detainees who were released from custody from November 14, 2001 onwards because they won their removal cases, organized per detainee Unable to produce without a full review of all files involved. The data requested concerning 90 and 180 day POCR releases is not tracked in the database.

5. All records reflecting the following information for detainees who were released at their 90-day custody review from November 14, 2001 onward:

- a. The number of such detainees per year. Unable to produce without a full review of all files involved. The data requested concerning 90 day POCR releases is not tracked in the database.
- b. The number of such detainees organized by field office. Unable to produce without a full review of all files involved. The data requested concerning 90 day POCR releases is not tracked in the database.
- c. The nationality of such detainees. Unable to produce without a full review of all files involved. The data requested concerning 90 day POCR releases is not tracked in the database.
- d. The number of such detainees with an administratively final order of removal that was judicially stayed, and the field office and nationality of such detainees Unable to produce without a full review of all files involved. The data requested concerning 90 day POCR releases is not tracked in the database.

6. All records reflecting the following information for detainees who were detained six months or longer following the entry of an administratively final order of removal that was not judicially stayed (hereinafter "Zadvydas detainees") from November 14, 2001 onward.

The information requested for questions b – d can be found in the attached excel document "Response Q6" organized by Field Office, country of citizenship, and length of detention, and date of book out.

- a. The number of such detainees per year.

FY2002	FY2003	FY2004	FY2005	FY2006	FY2007	FY2008	FY2009 (YTD)
230	401	653	695	227	230	110	5

- b. The number of such detainees organized by field office.
- c. The nationality of such detainees.
- d. The length of such detainees' detention.

7. All 90-day and 180-day post-order custody review (POCRs) decisions for all Zadvydas detainees from November 14, 2001 onwards, organized per detainee. Unable to produce without a full review of all files involved. The data requested concerning 90 and 180 day POCR releases is not tracked in the database.

8. All records reflecting the following information for all Zadvydas detainees who were removed from the United States from November 14, 2001 onward: The information requested for questions b – e can be found in the attached excel document "Response Q8" organized by Field Office, country of citizenship, and length of detention, and date of book out.

a. The number of such detainees per year.

FY2002	FY2003	FY2004	FY2005	FY2006	FY2007	FY2008	FY2009 (YTD)
1,243	2,448	3,850	4,216	2,883	2,977	855	222

b. The number of such detainees organized by field office.

c. The nationality of such detainees.

d. The length of such detainees' detention.

e. The length of such detainees' detention beyond the 90-day removal period.

9. All records reflecting the following information for all detainees with administratively final orders of removal that were not judicially stayed, and who were released from custody from November 14, 2001 onward because their removal was not significantly likely in the reasonably foreseeable future: Unable to answer this question as Judicial Stay information is not held in the system of record. DRO would be required to request each Alien File in order to produce these documents. This would require a large team of clerical staff to be detailed to a central location to request, and review the files. This would be a huge undertaking requiring months of clerical and appropriate officer and supervisory oversight staff to accomplish this huge undertaking.

a. The number of such detainees released per year. Unable to answer this portion of the question as Judicial Stay information is not held in the system of record.

b. The number of such detainees released per year by field office. Unable to answer this portion of the question as Judicial Stay information is not held in the system of record.

c. The nationality of such detainees. Unable to answer this portion of the question as Judicial Stay information is not held in the system of record.

d. The length of such detainees' detention. Unable to answer this portion of the question as Judicial Stay information is not held in the system of record.

e. The length of such detainees' detention beyond the 90-day removal period. Unable to answer this portion of the question as Judicial Stay information is not held in the system of record.

f. The number of such detainees who filed petitions for writs of habeas corpus, and the case name and court where such petitions were filed. Unable to answer this portion of the question as Judicial Stay information is not held in the system of record further habeas information is held by the Executive Office of Immigration Review (EOIR).

g. The number of such detainees who were released pursuant to writs of habeas corpus. Unable to answer this portion of the question as Judicial Stay information is not held in the system of record.

h. The numbers of such detainees who are currently released on supervision orders. Unable to answer this portion of the question as Judicial Stay information is not held in the system of record.

i. The conditions of supervised release of such detainees, including but not limited to release notices and orders, supervision orders, Intensive Supervision and Appearance Program (ISAP) conditions, and Enhanced Supervision/Reporting (ESR) conditions. This information is not tracked and only available by reviewing each individual file. DRO would be required to request each Alien File in order to produce these documents. This would require a large team of clerical staff to be detailed to a central location to request the files, review the files and copy all decisions in the file. This would be a huge undertaking requiring months of clerical and appropriate officer and supervisory oversight staff to accomplish this huge undertaking.

10. All records related to DHS, ICE, Headquarters Post-Order Detention Unit (HQPDU), and individual ICE field office policies, procedures, and/or guidelines on POCRs and conditions of supervised release, including but not limited to manuals, guidance, instructions, policy statements, legal memoranda, training materials, and sample forms, worksheets, and letters. These policies are not held by STU.

11. All records related to DHS, ICE, Headquarters Post-Order Detention Unit (HQPDU), and individual ICE field office policies, procedures, and/or guidelines regarding the detention, custody review, release, and conditions of supervision of noncitizens whose removal has been judicially stayed, including but not limited to manuals, guidance, instructions, policy statements, legal memoranda, training materials, and sample forms, worksheets, and letters. These policies are not held by STU.

12. All records and statistics compiled for the OIG's review of the POCR process, ICE's Compliance with Detention Limits for Aliens with a Final Order of Removal from the United States, OIG-07-28 (Feb. 2007). This was Deferred to Mark Matese's unit back in February.

EXHIBIT J

U.S. Department of Homeland Security
Office of General Counsel
Washington, DC 20528



**Homeland
Security**

March 12, 2010

Judy Rabinovitz
ACLU Immigrants' Rights Project
125 Broad St 18th Fl
New York, NY 10004-2400


Dear Sir or Madam:

The Department of Homeland Security has received your letter appealing the adverse determination of your Freedom of Information Act/Privacy Act (FOIA/PA) request by Immigration & Customs Enforcement (ICE) concerning the POIR process. On behalf of the Deputy Associate General Counsel for General Law, we acknowledge your appeal request and are assigning it number DHS10-007 for tracking purposes. Please reference this number in any future communications about your appeal.

A high number of FOIA/PA requests have been received by the Department. Accordingly, we have adopted the court-sanctioned practice of generally handling backlogged appeals on a first-in, first-out basis.¹ While we will make every effort to process your appeal on a timely basis, there may be some delay in resolving this matter. Should you have any questions concerning the processing of your appeal, please contact Howard Plofker at howard.plofker@dhs.gov.

Sincerely,

A handwritten signature in dark ink, appearing to read "Victoria Newhouse".

 Victoria Newhouse
Attorney-Advisor

¹ Appeals of expedited treatment denials will be handled on an expedited basis.

EXHIBIT K

U.S. Department of Homeland Security
800 North Capitol Street, NW #585
Washington, DC 20536-5009



**U.S. Immigration
and Customs
Enforcement**

August 31, 2010

Judy Rabinovitz, Esq.
ACLU Immigrants' Rights Project
125 Broad St. 18th Floor
New York, NY 10004

RE: DHS10-007; 2009FOIA3496, 2009FOIA1238

Dear Ms. Rabinovitz:

This is in response to your November 30, 2009, appeal regarding the determination by U.S. Immigration and Customs Enforcement (ICE) in response to your Freedom of Information Act/Privacy Act (FOIA/PA) requests. The initial requests asked for records about the post-order custody review (POCR) process that the Department of Homeland Security (DHS) applies to detained non-citizens with administratively final orders of removal.

ICE responded to your initial request by withholding records pursuant to the FOIA/PA exemptions (b)(2)(high), (b)(5), (b)(6), and (b)(7)(C). We have reviewed the records in question that gave rise to this initial determination.

A search for documents produced a total of seven-hundred forty-two (742) pages. Of those documents, two-hundred forty-two (242) pages were withheld in part pursuant to the exemptions listed above. Your request was also referred to the U.S. Department of Justice, Executive Office for Immigration Review (EOIR) for direct response to you. You have appealed the adequacy of the search conducted as the search failed to produce documents responsive to items 2, 4, 5, and 7 of your request. You also have appealed the determination of the responsiveness of documents produced to you. Our analysis follows.

As a general rule, the agency must undertake a search that is "reasonably calculated to uncover all relevant documents."¹ The reasonableness of an agency's search depends on how the agency conducted its search in light of the scope of the request.² Hence, the requester's description of the records sought, including a description in the request about the circumstances surrounding the agency's creation or maintenance of the records, will, in part, determine the reasonableness of the search.³ Even with a request for particular records known by the requester to exist, an agency's inability to locate each responsive document does not undermine an otherwise reasonable search, and even reasonable and thorough searches miss documents.⁴ As such, the fundamental question is not "whether there might exist any other documents possibly responsive to the request, but rather

¹ Weisberg v. U.S. Dep't of Justice, 705 F.2d 1344, 1351 (D.C. Cir. 1983).

² Negley v. FBI, 169 F. App'x 591, 595 (D.C. Cir. 2006).

³ Valencia-Lucena v. U.S. Coast Guard, 180 F.3d 321, 328 (D.C. Cir. 1999).

⁴ Duenas Iturralde v. Comptroller of the Currency, 315 F.3d 311, 315 (D.C. Cir. 2003).

whether the search for those documents was adequate.”⁵ The search, and hence the resulting responsiveness of the documents provided, is shown by an agency search made in good faith⁶ which is of all files reasonably expected to contain the requested records.⁷

In light of these requirements, it was determined that the Office of Detention and Removal Operations was the component likely to have responsive documents. As such, ICE searched the following field offices for documents responsive to your request:

Atlanta Field Office
 Boston Field Office
 Buffalo Field Office
 Chicago Field Office
 Dallas Field Office
 Denver Field Office
 Detroit Filed Office
 El Paso Field Office
 Houston Field Office
 Los Angeles Field Office
 Miami Field Office
 New Jersey Field Office
 New Orleans Field Office
 New York Field Offices
 Philadelphia Field Office
 Salt Lake City Field Office
 San Antonio Field Office
 San Diego Field Office
 San Francisco Field Office
 Seattle Field Office
 St. Paul Field Office
 Washington Field Office

The responses were also organized by field office per your request.

You indicated in your letter that a comprehensive database search within DRO may not have been sufficient. However, we have indicated that the failure to produce documents responsive to items 2, 4, 5, and 7 was, in part, as a result of the type of information stored in the database, specifically the lack of notations of judicially stayed cases.⁸ If the database does not contain the files, or reference of the search criteria requested, the Courts have not required an agency’s FOIA staff to spend “countless numbers of personnel hours seeking needles in bureaucratic haystacks.”⁹ Furthermore, the lack of an additional search beyond those areas that were determined likely to have responsive records, simply because no documents were found in response to requested items, is not indicative of an inadequate search.¹⁰ Rather, in the absence of specification by the requester as to particular field offices or databases, Courts have rejected the notion that the agency is required to expand the search

⁵ See, Steinberg v. U.S. Dep’t of Justice, 23 F.3d 548, 551 (D.C. Cir. 1994).

⁶ See, Wilson v. DEA, 414 F. Supp. 2d 5, 12 (D.D.C. 2006).

⁷ See, Schmidt v. DOD, No. 3:04-1159, 2007 WL 196667, at *2 (D. Conn. Jan. 23, 2007).

⁸ See Memo from Jessica Fields, dated April 20, 2009, at p.2 Item 1.e.

⁹ Devine v. Marsh, 2 Gov’t Disclosure Serv. (P-H) ¶ 82,022, at 82,186 (E.D. Va. Aug. 27, 1981).

¹⁰ See Duenas Iturralde v. Comptroller of the Currency, 315 F.3d 311, 315 (D.C. Cir. 2003).

simply when no responsive documents are found pursuant to a search in locations originally determined to likely have responsive records.¹¹ As such, upon review of the original search conducted, the comprehensive search of the twenty-two field offices, with a referral to the Department of Justice, Executive Office of Immigration Review (EOIR), and the search by the Office of the Inspector General (OIG), constituted a search reasonably calculated to uncover all relevant documents.¹²

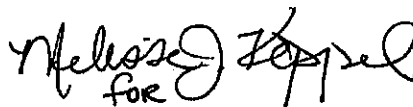
You also have appealed the withholdings applied in the initial determination. The withholdings included third party names, telephone numbers, email recipients, Field Office Director names, Deportation officer names, and other identifying information, to prevent an unwarranted invasion of privacy under (b)(6) and (b)(7)(C). Also, "bond determination check sheets", "ISAP participant placement worksheets", "alien file requirements", "ESR participant placement worksheets", "NSLD potential exemptions" forms, "review procedures" for post-order Columbian FARC cases, "USCIS referral" exemption forms, and other lists or information which are internal to the processes and procedures of the agency were withheld under (b)(2)(high). Also, the legal advice contained in a "Memorandum for Legal Counsel" regarding the detention and release during the removal period for aliens granted withholding or deferral of removal was withheld under (b)(5) as both attorney work product and deliberative process material. This withholding also could have applied the use of (b)(2)(high) as internal to the procedures used by the agency, and that withholding is applied in this review. In particular, the reasoning behind the use of these exemptions in the initial determination was provided in the September 30, 2009 initial determination letter.

Upon a complete review of the information withheld in the initial determination on your FOIA request, the withholding of this information was proper in all respects, and the information is exempt from disclosure under the applicable provisions of 5 U.S.C. § 552 cited above.

This decision is the final action of the Department of Homeland Security concerning your FOIA/PA request. Inasmuch as you consider this to be a denial of your appeal, you may obtain judicial review of this decision pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B) in the United States District Court in the district in which you reside, or in which the agency records are situated, or in the District of Columbia.

Should you have any questions regarding this appeal closure, please contact ICE at ice-foia@dhs.gov. In the subject line of the email please include your appeal number, which is **DHS10-007**, as well as your FOIA numbers, which are **2009FOIA3496** and **2009FOIA1238**.

Sincerely,



Susan Mathias
Deputy Chief
Commercial and Administrative Law Division
ICE Office of the Principal Legal Advisor
Department of Homeland Security

¹¹ See, Gilliland v. Bureau of Prisons, No. 03-5251, 2004 WL 885222, at *1 (D.C. Cir. Apr. 23, 2004).

¹² See, Johnston v. United States Dep't of Justice, No. 97-2173, 1998 WL 518529, at *1 (8th Cir. Aug. 10, 1998).

EXHIBIT L



September 21, 2010

Catrina Pavlik-Keenan
FOIA Officer
U.S. Immigration and Customs Enforcement
800 North Capitol St., NW
5th Floor, Suite 585
Washington, DC 20528

**RE: Follow-up FOIA Request for Records Related to Nearly 6000
Prolonged Immigration Detainees Released from ICE Custody
After Winning Their Removal Cases**

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
IMMIGRANTS'
RIGHTS PROJECT

PLEASE RESPOND TO:
NATIONAL OFFICE
125 BROAD STREET, 18TH FL.
NEW YORK, NY 10004-2400
T/212.549.2660
F/212.549.2654
WWW.ACLU.ORG

CALIFORNIA OFFICE
39 DRUMM STREET
SAN FRANCISCO, CA 94111-4805
T/415.343.0770
F/415.395.0950

OFFICERS AND DIRECTORS
SUSAN N. HERMAN
PRESIDENT

ANTHONY D. ROMERO
EXECUTIVE DIRECTOR

RICHARD ZACKS
TREASURER

Dear Freedom of Information Officers:

This letter constitutes a request pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, submitted on behalf of the Immigrants' Rights Project (IRP) of the American Civil Liberties Union (ACLU). The IRP is also requesting the expedited processing of this request, pursuant to 5 U.S.C. § 552(a)(6)(E) and agency regulations, and a fee waiver, pursuant to 5 U.S.C. § 552(a)(4)(A)(iii).

BACKGROUND

On January 13, 2009, ACLU IRP submitted a FOIA request seeking records related to the administrative post-order custody review (POCR) process, including, *inter alia*, data on detainees held for over six months during the pendency of their removal proceedings, data on how long detainees were held in custody before being removed, and copies of POCR determinations. See ACLU IRP FOIA Request, Jan. 13, 2009, attached as Exhibit A. In particular, ACLU IRP requested "[a]ll records reflecting [the number, nationality, length of detention, and location of detention] for prolonged detainees¹ who were released from custody from November 14, 2001 onward *because they won their removal cases.*" See *id.* at Qu. 3 (emphasis added).

On September 30, 2009, ACLU IRP received a letter from your office at Immigration and Customs Enforcement (ICE) producing certain records, including several spreadsheets in an Excel file entitled "09-FOIA-1238 Response Q1, Q3, Q6, Q8." The tab within that Excel file entitled

¹ "Prolonged detainee" was defined previously in the request as an "individual[] who w[as] detained six months or longer." See ACLU IRP FOIA Request, Jan. 13, 2009, at Qu. 1.

“Response Q3” listed information as to the book-in area of responsibility, the nationality, the length of stay, the date of release, and the “[c]ase [a]ction” taken as to 5,928 detainees. *See* Document “09-FOIA-1238 Response Q1, Q3, Q6, Q8,” Tab 3, attached as Exhibit B. Moreover, another responsive document entitled “r_09-FOIA-1238 DRO Response Itemized” stated that this tab of the spreadsheet “indicates how many prolonged detainees . . . ‘won’ their cases and then were released each fiscal year,” based on “criteria . . . [such as] aliens who were granted adjustment to LPR Status, a waiver or cancellation, granted a benefit by CIS, or where their proceedings were terminated.” *See* Document “r_09-FOIA-1238 DRO Response Itemized” at 2, attached as Exhibit C.

The instant FOIA request pertains to this restricted universe of 5,928 detainees about which the ACLU IRP seeks additional information.

RECORDS REQUESTED

Please disclose:

1. All records² reflecting the statutory authority pursuant to which each of the 5,928 detainees who were released because they won their removal proceeding (as reflected in Tab 3 of the Excel spreadsheet entitled “09-FOIA-1238 Response Q1, Q3, Q6, Q8”) was held in immigration detention (e.g., under 8 U.S.C. §§ 1225, 1226(a), 1226(c), 1241).
2. All records relating to the decision to detain or the justification for detaining each of these 5,928 individuals, including, but not limited, to copies of their custody review determinations, their bond hearing determinations, their parole requests and denials, any reviews of their custody determinations by immigration judges, and any other documents concerning their continued detention.
3. All records reflecting the total number of the 5,928 detainees who were subject to mandatory detention under 8 U.S.C. § 1226(c).
4. All records reflecting the total number of the 5,928 detainees who requested hearings under *In Re Joseph*.
5. All immigration judge or Board of Immigration Appeals decisions related to hearings conducted under *In Re Joseph* for any of the 5,928 detainees.

² *See* 5 U.S.C. § 552(2) (defining “record” as “(A) any information that would be an agency record subject to the requirements of this section when maintained by an agency in any format, including an electronic format; and (B) any information described under subparagraph (A) that is maintained for an agency by an entity under Government contract, for the purposes of records management.”).

THE REQUESTOR

The ACLU is a nationwide, nonprofit, and nonpartisan organization dedicated to protecting civil rights and civil liberties in the United States. It is the largest civil liberties organization in the country, with offices in the 50 states and over 500,000 members. The ACLU is dedicated to holding the U.S. government accountable to principles of due process and the U.S. Constitution in general, including those principles that bear on detention and other significant deprivations of liberty.

AMERICAN CIVIL LIBERTIES
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The ACLU publishes newsletters, news briefings, right-to-know handbooks, and other materials that are widely disseminated to the public. These materials are made available to everyone—including tax-exempt organizations, non-profit groups, and law students and law faculty—for either no cost or for a nominal fee through its public education department.

The ACLU also disseminates information through its high-traffic website, <http://www.aclu.org>. The website provides in-depth information on a range of civil liberties issues; address civil liberties issues that are currently in the news; and contains hundreds of documents relating to the ACLU's work. The website also specifically features information obtained through the FOIA. *See, e.g.*, <http://www.aclu.org/safefree/torture/torturefoia.html>; http://www.aclu.org/patriot_foia/index.html. The ACLU also publishes an electronic newsletter, which is distributed to subscribers via email; airs regular podcasts; and produces a television series on civil liberties issues entitled *The Freedom Files*. *See* <http://aclu.tv>.

Accordingly, the ACLU is an organization whose “main professional activity or occupation is information dissemination.” 6 C.F.R. § 5.5(d)(3). The ACLU is also a “representative of the news media” within the meaning of the statute and applicable regulations. *See* 5 U.S.C. § 552(a)(4)(A)(iii). (defining a representative of the news media as an entity that “gathers information of potential interest to a segment of the public” and “uses its editorial skills to turn raw materials into a distinct work, and distributes that work to an audience”); *see also National Sec. Archive v. U.S. Department of Defense*, 880 F.2d 1381, 1397 (D.C. Cir. 1989) (same); 45 C.F.R. § 5.5 (defining representative of the news media as “a person actively gathering information for an entity organized and operated to publish or broadcast news to the public”).

EXPEDITED PROCESSING

We request Track 1 expedited treatment for this FOIA request. This request qualifies for expedited treatment pursuant to 5 U.S.C. § 552(a)(6)(E) and applicable regulations. There is a “compelling need” for expedited processing of this request, *see* 5 U.S.C. § 552(a)(6)(E)(i)(I), namely, an “urgency to inform the public concerning actual or alleged Federal Government activity.” 5 U.S.C. § 552(a)(6)(E)(v)(II); *see also* 6 C.F.R. § 5.5(d)(1)(ii) (same).

In particular, the issue of prolonged detention and the post order custody reviews purporting to justify such long-term detention is an issue that must be exposed immediately as it concerns the basic liberty interest of noncitizens and is a matter of currently being debated and acted upon nationally.

For its part, the Obama administration has announced the need for and initiation of an overhaul of the national immigration detention system, specifically highlighting that incarceration of noncitizens has reached record levels without adequate consideration of the basis for their detention. *See* Dr. Dora Schriro, Immigrations and Customs Enforcement, “Immigration Detention Overview and Recommendations” 3 (Oct. 6, 2009). The issue is also of concern to Congress. *See, e.g.*, “Moving Toward More Effective Immigration Detention Management,” Subcommittee on Border, Maritime, and Global Counterterrorism, Dec. 10, 2009.

Advocacy organizations have likewise drawn attention to the pressing need for an end to prolonged and indefinite detention, reform of the mandatory detention provisions, and procedural safeguards to protect noncitizens’ constitutional and statutory rights. *See, e.g.*, Amnesty Int’l, *Jailed Without Justice* (2008) (documenting problems with detention as an immigration enforcement mechanism, including, *inter alia*, wrongful/mistaken mandatory detention, prolonged and indefinite detention, unnecessary detention of noncitizens who are entitled to forms of relief like asylum, and insufficient access to judicial review of detention determinations); Constitution Project, “Recommendations for Reforming our Immigration Detention System and Promoting Access to Counsel in Immigration Proceedings,” (2009) (highlighting the overuse of detention for noncitizens that “generat[es] great expense and impos[es] considerable personal suffering” on noncitizens, the need to consider alternatives to detention, and the utility of imposing maximum time limits for completion of removal proceedings); Migration Policy Institute, “Immigrant Detention: Can ICE Meet Its Legal Imperatives and Case Management Responsibilities?” (2009) (noting trend that “ICE detains large numbers of persons for more than six months” and that a “high percentage of ICE detainees . . . do not have criminal records, which is

difficult to explain since mandatory detention laws largely apply to criminal aliens”). Media coverage of prolonged detention further demonstrates that it is a matter of significant interest and exigency to the public. *See, e.g.*, Nina Bernstein, *After a 5-Year Fight, a Detained Immigrant is Freed*, N.Y. Times, July 3, 2010; Nina Bernstein, *“How One Marijuana Cigarette May Lead to Deportation,”* N.Y. Times, Mar. 31, 2010.

Accordingly, public scrutiny of the statutory grounds for prolonged detention of the nearly 6000 noncitizens who won their removal cases—including the administrative custody reviews underlying their continued detention—is of acute importance. The ACLU is therefore entitled to expedited processing of this request.

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION

FEE WAIVER

The ACLU also requests a full fee waiver on the grounds that disclosure of the requested records is in the public interest and is “likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii); *see also* 45 C.F.R. § 5.45.

As set forth above, this request aims at furthering public understanding of government conduct: specifically, whether the post-order custody reviews for detainees in the custody of ICE are sufficient to satisfy the agency’s statutory and constitutional obligations. In this respect, the request strongly resembles the many previous instances in which government waived all fees associated with responding to FOIA requests by the ACLU.³

In any event, as discussed *supra*, the ACLU is a “representative of the news media” and does not seek the records requested for commercial use. Accordingly, should the government assess fees for the processing of this request, those fees should be “limited to reasonable standard charges for document duplication” alone. 5 U.S.C. § 552(a)(4)(A)(ii)(II).

³ The following are recent examples of requests in which agencies did not charge the ACLU fees associated with responding to its FOIA requests: (1) a FOIA request submitted to the Department of State in April 2005; (2) a FOIA request submitted to the National Institute of Standards and Technology in April 2005; (3) a FOIA request submitted to the Office of Science and Technology in the Executive Office of the President in August 2003; (4) a FOIA request submitted to the Federal Bureau of Investigation in August 2002; (5) a FOIA request submitted to the Office of Intelligence Policy and Review in August 2002; (6) a FOIA request submitted to the Office of Information and Privacy in the Department of Justice in August 2002.

* * *

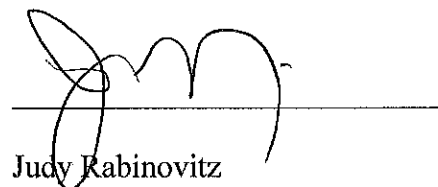
Thank you for your consideration of this request. If this request is denied in whole or in part, the ACLU asks that the government justify all redactions by reference to the specific exemptions of the FOIA. We expect that the government release all segregable portions of otherwise exempt material. We reserve the right to appeal a decision to withhold any information or to deny expedited processing or a waiver of fees. We look forward to your request to our request for expedited processing within ten (10) business days, as required under 5 U.S.C. § 552(a)(6)(E)(ii)(I). Notwithstanding our request for expedited processing, we alternatively look forward to your reply to this request within twenty (20) business days, as required under 5 U.S.C. § 552(a)(6)(A)(I).

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION

Please respond to Judy Rabinovitz, Deputy Director, ACLU Immigrants' Rights Project, 125 Broad St., 18th Floor, New York, NY 10004, Tel: 212-549-2618, Email: jrabinovitz@aclu.org. Also, please notify us in advance if the cost of photocopying the documents requested exceed \$100.00.

* * *

Under penalty of perjury, I certify, to the best of my knowledge and belief, that the above information is true and correct.

A handwritten signature in black ink, appearing to read 'Judy Rabinovitz', is written over a horizontal line.

Judy Rabinovitz
ACLU Immigrants' Rights Project
125 Broad St., 18th Floor
New York, NY 10004
Tel: 212-549-2618
Fax: 212-549-2654
Email: jrabinovitz@aclu.org

EXHIBIT M

U.S. Department of Homeland Security
800 North Capitol St., NW #585
Washington, DC 20536



U.S. Immigration
and Customs
Enforcement

Oct. 1, 2010

Judy Rabinovitz
ACLU
125 Broad Street, 18th Fl.
New York, NY 10004

RE: FOIA Case Number 2011-FOIA-0002

Dear Ms. Rabinovitz:

This letter responds to your requests for a waiver of fees and the expedited processing of your Freedom of Information Act (FOIA) request dated September 21, 2010. You have requested records related to nearly 6000 prolonged immigration detainees released from ICE custody after winning their removal cases.

As it relates to your fee waiver request, your request will be held in abeyance pending the quantification of responsive records. The DHS FOIA Regulations, 6 CFR § 5.11(k)(2), set forth six factors to examine in determining whether the applicable legal standard for a fee waiver has been met: (1) Whether the subject of the requested records concerns "the operations or activities of the government;" (2) Whether the disclosure is "likely to contribute" to an understanding of government operations or activities; (3) Whether disclosure of the requested information will contribute to the understanding of the public at large, as opposed to the individual understanding of the requestor or a narrow segment of interested persons; (4) Whether the contribution to public understanding of government operations or activities will be "significant;" (5) Whether the requester has a commercial interest that would be furthered by the requested disclosure; and (6) Whether the magnitude of any identified commercial interest to the requestor is sufficiently large in comparison with the public interest in disclosure, that disclosure is primarily in the commercial interest of the requestor. If any responsive records are located, we will consider these factors in our evaluation of your request for a fee waiver.

Immigration and Customs Enforcement (ICE) evaluates requests for expedited processing based upon the legal standards set forth in the Electronic Freedom of Information Act Amendments of 1996 as incorporated into the Department of Homeland Security's Freedom of Information Act regulations¹. These regulations establish two factors to examine in determining whether the applicable legal standard for expedited processing has been met. I have considered the following factors in my evaluation of your request for expedited processing: (1) whether the lack of an expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; and (2) if there is an urgency to inform the public about an actual or alleged federal government activity, if the request is made by a person primarily engaged in disseminating information.


¹ 6 CFR § 5.5(d).

Upon review of your request and a careful consideration of the factors listed above, I have determined to deny your request for expedited processing.

The undersigned is the person responsible for this determination. You may appeal this finding by writing to the Associate General Counsel (General Law), Department of Homeland Security, FOIA Appeals, Washington, DC 20528, within 60 days from the date of this determination. It should contain any information and state, to the extent possible, the reasons why you believe the initial determination should be reversed and the envelope in which the appeal is mailed in should be prominently marked "FOIA Appeal." The Privacy Office's determination will be administratively final.

If you have any questions pertaining to your request, please contact the FOIA Office at (202) 732-0300.

Sincerely,



Catrina M. Pavlik-Keenan
FOIA Officer

U.S. Department of Homeland Security
800 North Capitol St., NW #585
Washington, DC 20536



U.S. Immigration
and Customs
Enforcement

Oct. 4, 2010

Judy Rabinovitz
ACLU
125 Broad Street, 18th Fl.
New York, NY 10004

RE: FOIA Case Number 2011-FOIA-0003

Dear Ms. Rabinovitz:

This letter responds to your requests for a waiver of fees and the expedited processing of your Freedom of Information Act (FOIA) request dated September 21, 2010. You have requested records related to the Post-Order Custody Review Process.

As it relates to your fee waiver request, your request will be held in abeyance pending the quantification of responsive records. The DHS FOIA Regulations, 6 CFR § 5.11(k)(2), set forth six factors to examine in determining whether the applicable legal standard for a fee waiver has been met: (1) Whether the subject of the requested records concerns "the operations or activities of the government;" (2) Whether the disclosure is "likely to contribute" to an understanding of government operations or activities; (3) Whether disclosure of the requested information will contribute to the understanding of the public at large, as opposed to the individual understanding of the requestor or a narrow segment of interested persons; (4) Whether the contribution to public understanding of government operations or activities will be "significant;" (5) Whether the requester has a commercial interest that would be furthered by the requested disclosure; and (6) Whether the magnitude of any identified commercial interest to the requestor is sufficiently large in comparison with the public interest in disclosure, that disclosure is primarily in the commercial interest of the requestor. If any responsive records are located, we will consider these factors in our evaluation of your request for a fee waiver.

Immigration and Customs Enforcement (ICE) evaluates requests for expedited processing based upon the legal standards set forth in the Electronic Freedom of Information Act Amendments of 1996 as incorporated into the Department of Homeland Security's Freedom of Information Act regulations¹. These regulations establish two factors to examine in determining whether the applicable legal standard for expedited processing has been met. I have considered the following factors in my evaluation of your request for expedited processing: (1) whether the lack of an expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; and (2) if there is an urgency to inform the public about an actual or alleged federal government activity, if the request is made by a person primarily engaged in disseminating information.

Upon review of your request and a careful consideration of the factors listed above, I have determined to deny your request for expedited processing.

¹ 6 CFR § 5.5(d).

The undersigned is the person responsible for this determination. You may appeal this finding by writing to the Associate General Counsel (General Law), Department of Homeland Security, FOIA Appeals, Washington, DC 20528, within 60 days from the date of this determination. It should contain any information and state, to the extent possible, the reasons why you believe the initial determination should be reversed and the envelope in which the appeal is mailed in should be prominently marked "FOIA Appeal." The Privacy Office's determination will be administratively final.

If you have any questions pertaining to your request, please contact the FOIA Office at (202) 732-0300.

Sincerely,

A handwritten signature in black ink, appearing to read "R. Pavlik-Keenan", with a long, sweeping horizontal flourish extending to the right.

Catrina M. Pavlik-Keenan
FOIA Officer

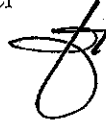
A small, stylized handwritten signature or mark in black ink, possibly initials, located below the printed name.

EXHIBIT N



Associate General Counsel (General Law)
Department of Homeland Security
Washington, D.C. 20528

December 23, 2010

**RE: Freedom of Information Act Appeal: Denial of Expedited
Processing, Holding Fee Waiver in Abeyance, & Lack of
Determination on Fee Status
Case Number 2011-FOIA-0002**

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
IMMIGRANTS'
RIGHTS PROJECT

PLEASE RESPOND TO:
NATIONAL OFFICE
125 BROAD STREET, 18TH FL.
NEW YORK, NY 10004-2400
T/212.549.2660
F/212.549.2654
WWW.ACLU.ORG

OFFICERS AND DIRECTORS
SUSAN H. HERMAN
PRESIDENT

ANTHONY D. ROMERO
EXECUTIVE DIRECTOR

Dear Associate General Counsel:

Pursuant to 6 C.F.R. § 5.9, the American Civil Liberties Union (ACLU) Immigrants' Rights Project appeals Immigration and Customs Enforcement's (ICE) decision to deny the ACLU expedited processing of its request under the Freedom of Information Act (FOIA). The ACLU also appeals ICE's failure to grant the ACLU fee status as a "representative of the news media" and its decision to hold the ACLU's request for a fee waiver in abeyance.

I. BACKGROUND

The ACLU's FOIA request seeks records related to the post-order custody review (POCR) process that the Department of Homeland Security (DHS) applies to detained non-citizens with administratively final orders of removal. Specifically, the ACLU's FOIA Request seeks information concerning the statutory authority underlying the detention of 5,928 immigration detainees who were released from custody from November 14, 2001 onward *because they won their removal cases*. See ACLU FOIA Request, No. 2011-FOIA-0002, at 1-2 (Sept. 21, 2010), attached as Exhibit I. In a letter dated October 1, 2010, ICE summarily denied expedited processing of that request, merely restating the standard without providing any explanation for its decision. See Pavlik-Keenan Letter, dated Oct. 1, 2010, at 1-2, attached as Exh. II. In the letter, ICE also held the ACLU's request for a fee waiver in abeyance "pending the quantification of responsive records," *id.* at 1, and completely ignored the

ACLU's request for fee status as a "representative of the news media." *Id.* As set forth below, the aforementioned decisions are wholly without merit.

II. THE INSTANT FOIA REQUEST WARRANTS EXPEDITED PROCESSING

First, the ACLU's FOIA Request clearly meets the statutory and regulatory requirements for expedited processing. "With respect to a request made by a person primarily engaged in disseminating information," the Act provides that a "compelling need" for expedited processing exists where there is an "urgency to inform the public concerning actual or alleged Federal Government activity." 5 U.S.C. § 552(a)(6)(E)(v)(II); *see also* 6 C.F.R. § 5.5(d)(1)(ii) (same). The United States Court of Appeals for the District of Columbia Circuit has identified at least three factors for determining whether an "urgency to inform" exists: (1) whether the request concerns a matter of current exigency to the American public; (2) whether the consequences of delaying a response would compromise a significant recognized interest; and (3) whether the request concerns federal government activity. *Al-Fayed v. C.I.A.*, 254 F.3d 300, 310 (D.C. Cir. 2001).

Clearly, the FOIA Request on its face concerns "actual or alleged federal government activity." Furthermore, the information requested concerns a matter of current public exigency: namely, the persistent prolonged and indefinite detention—at times made mandatory by statute—of thousands of individuals who are being detained in contravention of the Constitution without adequate review. In particular, the FOIA Request focuses on those noncitizens who were detained for prolonged periods of time despite ultimately being released as having won their removal cases. Recent news articles in major media outlets have highlighted the expansion of such mass detention and the deficiencies of the government's review procedures.¹ Moreover, the Supreme Court has long recognized that "[f]reedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects" and that detention requires "strong procedural protections." *Zadvydas v. Davis*, 533 U.S. 678, 690-91 (2001). The ACLU's earlier FOIA request from January 13, 2009—on which the instant FOIA Request is based—demonstrates that thousands of individuals are being subject to prolonged detention under circumstances that fail to uphold the *Zadvydas* Court's ruling. The due process problems raised by prolonged mass detention in the absence of adequate review are clearly matters of urgent public concern.

¹ *See, e.g.*, Michelle Roberts, *AP IMPACT: Immigrants face detention, few rights*, Wash. Post, Mar. 15, 2009; Nina Bernstein, *How One Marijuana Cigarette May Lead to Deportation*, N.Y. Times, Mar. 30, 2010 (noting that an individual spent three years in immigration detention while fighting removal case).

For similar reasons, delaying a response would compromise at least two significant recognized interests: namely, both non-citizen detainees' liberty interest against prolonged and arbitrary detention, and the public's interest in holding the government accountable for its violations of law. Given the ongoing use of prolonged immigration detention as reflected in the documents released pursuant to the ACLU's January 13, 2009 FOIA request, a delayed response here would hinder the efforts of advocacy organizations such as the ACLU and other key stakeholders to ensure that the government meets its statutory and constitutional obligations as it enforces the immigration laws.

Furthermore, the ACLU's FOIA Request makes it abundantly clear that the ACLU is an organization "primarily engaged in disseminating information." *See* Exh. A at 3; *see also* 6 C.F.R. § 5.5(d)(3). As set forth in the FOIA Request, the ACLU publishes newsletters, news briefings, right-to-know handbooks, and other materials that are widely disseminated to the public. These materials are made available to everyone—including tax-exempt organizations, non-profit groups, law students, and law faculty—for either no cost or for a nominal fee through its public education department. The ACLU also disseminates information through its high-traffic website, <http://www.aclu.org>. The website provides in-depth information on a range of civil liberties issues; addresses civil liberties issues that are currently in the news; and contains hundreds of documents relating to the ACLU's work. The website specifically features information obtained through the FOIA. *See, e.g.*, <http://www.aclu.org/safefree/torture/torturefoia.html>; http://www.aclu.org/patriot_foia/index.html. The ACLU also publishes an electronic newsletter, which is distributed to subscribers via email; airs regular podcasts; and produces a television series on civil liberties issues entitled *The Freedom Files*. *See* <http://aclu.tv>.

These characteristics easily suffice to convey "representative of the news media organization" status on the ACLU. *See National Security Archive v. Dep't of Defense*, 880 F.2d 1381, 1387 (D.C. Cir. 1989) (noting that in determining whether a requester is a representative of the news media, the critical question is whether the entity in question "gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience") (construing 5 U.S.C. § 552(a)(4)(A)(ii-iii)); *Elec. Privacy Info. Ctr. v. Dep't of Defense*, 241 F. Supp. 2d 5, 11 (D.D.C. 2003) ("It is critical that the phrase 'representative of the news media' be broadly interpreted if the act is to work as expected . . . I[n] fact, any person or organization which regularly publishes or disseminates information to the public . . . should qualify for waivers as a 'representative of the news media.'"). Courts, moreover, have recognized

that organizations that meet the “representative of the news media” standard necessarily meet the “primarily engaged in disseminating information” standard. *See ACLU v. United States Dep't of Justice*, 321 F. Supp. 2d 24, 30, n.5 (D.D.C. 2004) (holding that a FOIA requester that was a “representative of the news media” for purposes of a fee waiver was indeed “primarily engaged in disseminating information” for expedited processing purposes).

Courts have also specifically recognized that advocacy organizations, like the ACLU, that disseminate information and conduct public education on civil rights issues are entitled to expedited processing. *See Leadership Conf. on Civil Rights v. Gonzales*, 404 F. Supp. 2d 246, 260 (D.D.C. 2005) (holding that an organization that “disseminates information regarding civil rights . . . to educate the public, promote effective civil rights laws and ensure their enforcement by the Department of Justice” was entitled to expedited processing). As described in its FOIA Request, the ACLU is a nationwide, nonprofit, nonpartisan organization dedicated to protecting civil rights and civil liberties in the United States and disseminating information on these issues through diverse means. *See* Exh. A at 3. For all these reasons, the ACLU is “primarily engaged in disseminating information,” and its FOIA Request should be processed in an expedited manner.

III. THE INSTANT FOIA REQUEST WARRANTS A FEE WAIVER.

Furthermore, the agency erred with respect to the ACLU’s fee requests. As set forth above, the agency failed to acknowledge that the ACLU was a “representative of the news media” within the meaning of the Act. *See supra*. Moreover, the agency’s letter cites no authority for holding the ACLU’s fee waiver request in abeyance. This decision is particularly unreasonable in light of the fact that government agencies in numerous comparable instances have granted the ACLU fee waivers in the past. *See* Exh. A at 5 n.3.²

² In addition to the examples listed in the FOIA Request, agencies have granted fee waivers to the ACLU on numerous other occasions. For example, the Department of Justice granted a fee waiver to the ACLU with regard to a December 2008 FOIA request for records related to the detention, interrogation, treatment, or prosecution of suspected terrorists. The Department of Justice also did not charge the ACLU fees associated with FOIA requests submitted by the ACLU in November 2007, December 2005, and December 2004. The Department of Health and Human Services granted a fee waiver with regard to a FOIA request submitted in November 2006. In May 2005, the United States Department of Commerce granted a fee waiver to the ACLU with respect to its request for information regarding the radio-frequency identification chips in United States passports. In March 2005, the Department of State granted a fee waiver to the ACLU with regard to a request submitted that month regarding the use of immigration laws to exclude prominent non-citizen scholars and intellectuals from the country because of their political views, statements, or associations. In addition, the Department

Indeed, as set forth below, the FOIA Request here clearly meets the statutory and regulatory requirements for fee waivers. *See* 5 U.S.C. § 552(a)(4)(A)(ii-iii) (providing for fee waiver where disclosure is “likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester”); *see also* 6 C.F.R. § 5.11(k).

- (1) First, the subject of the requested records directly concerns “the operations or activities of the government.” 6 C.F.R. § 5.11(k)(2)(i). Specifically, the FOIA Request seeks disclosure of records detailing the statutory basis and authority for the government’s prolonged detention of individuals who were ultimately released from ICE custody because they won their removal cases.
- (2) Moreover, disclosure of the requested records is “likely to contribute to an understanding of government operations or activities” for the reasons listed above. 6 C.F.R. § 5.11(k)(2)(ii). The ACLU intends to keep the public at large informed about the content of the responsive records. These records would not be “duplicative or substantially identical” with presently available information as they do not yet exist in the public domain. *See id.*
- (3) Any requested records disclosed by DHS would not be used for “the individual understanding of the requestor,” but rather for “the understanding of a reasonably broad audience of persons interested in the subject.” 6 C.F.R. § 5.11(k)(2)(iii). As noted in the FOIA Request, the ACLU is a nationwide, nonprofit, nonpartisan organization that broadly disseminates information on civil rights and civil liberties issues through a wide array of media. *See* Exh. A. at 3. Thus, the ACLU has “expertise in the subject area and ability and intention to effectively convey information to the public.” 6 C.F.R. § 5.11(k)(2)(iii).
- (4) The contribution of responsive records to public understanding of government operations regarding the POOR process would also be very “significant.” *See* 6 C.F.R. § 5.11(k)(2)(iv). Presently, the public knows very little about the procedures afforded non-citizens who are detained for prolonged periods of time, and even less about the government’s ability to properly implement these procedures. The public also has little information concerning how many non-citizens that are subject to mandatory detention are ultimately released because they won their removal case. ICE’s response to the ACLU’s FOIA Request will significantly aid the larger public to understand the effect

of Defense did not charge the ACLU fees associated with FOIA requests submitted by the ACLU in April 2007, June 2006, February 2006, and October 2003.

of its government's policies and whether the government is complying with its statutory and constitutional obligations against subjecting immigrants to prolonged and arbitrary detention. Moreover, documents produced in response to this Request will shed light on the procedures the government follows to ensure that individuals are released where appropriate rather than unnecessarily detained.

- (5) The ACLU has no commercial interest in the disclosure of the requested records. *See* 6 C.F.R. § 5.11(k)(3)(i). As explained in the FOIA Request, the ACLU is a non-profit organization dedicated to protecting civil rights and civil liberties in the United States. *See* Exh. A at 3. The ACLU intends to use the records for the purpose of keeping the public informed about the government's immigration detention and removal practices.
- (6) Finally, the public interest in the disclosure of the requested records is significant. *See* 6 C.F.R. § 5.11(k)(3)(ii). The FOIA Request concerns the fundamental liberty interest against unlawful and arbitrary detention. In requesting the records at issue, the ACLU seeks to ensure that non-citizens are afforded constitutionally adequate review over their imprisonment and not illegally subject to prolonged detention. As demonstrated by the records produced by ICE in response to the ACLU's FOIA request of January 13, 2009, there is evidence that immigrants are being improperly held in DHS custody. Were the public denied its right under FOIA to access records relating to the reason this group of 5,928 individuals were subject to detention in the first place, the government could continue to subject non-citizens to prolonged detention without meaningful review, to the substantial impairment of immigrants' due process rights.

For the foregoing reasons, we respectfully request that the agency grant expedited processing for the instant Request. In addition, we ask that the agency grant the ACLU a fee waiver or, in the alternative, grant it fee status as a "representative of the news media." We look forward to your prompt response.

Sincerely,



Tanaz Moghadam
Attorney
ACLU Immigrants' Rights Project
125 Broad St., 18th Floor
New York, NY 10004
Tel: 212-284-7316
Fax: 212-549-2654
Email: tmoghadam@aclu.org

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION

CC: Catrina Pavlik-Keenan
FOIA Officer
U.S. Immigration and Customs Enforcement
800 North Capitol St., NW, #585
Washington, DC 20536

EXHIBIT P



December 20, 2010

Catrina Pavlik-Keenan
FOIA Officer
U.S. Immigration and Customs Enforcement
800 North Capitol Street, NW, Stop 5009
Washington, D.C. 20536

RE: Freedom of Information Act Request #2011-FOIA-0002

Dear Ms. Pavlik-Keenan:

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
IMMIGRANTS'
RIGHTS PROJECT

PLEASE RESPOND TO:
NATIONAL OFFICE
125 BROAD STREET, 18TH FL.
NEW YORK, NY 10004-2400
T/212.549.2660
F/212.549.2654
WWW.ACLU.ORG

OFFICERS AND DIRECTORS
SUSAN H. HERMAN
PRESIDENT

ANTHONY D. ROMERO
EXECUTIVE DIRECTOR

I am writing in response to your letter of December 8, 2010 regarding the above-captioned Freedom of Information Act ("FOIA") Request we filed on September 21, 2010 ("FOIA Request").

Your letter states that "the phrase 'winning their removal case' requires clarification prior to this being considered a perfected FOIA request."

We disagree that the phrase "winning their removal case"—a phrase that ICE responded to in a prior, related request—requires clarification prior to this being considered a perfected FOIA request. In our FOIA Request, we defined in great detail the 5,928 detainees as to which we sought information. Specifically, the FOIA Request stated that we learned of this group of detainees based on information that your office produced in response to the related FOIA request we submitted on January 13, 2009 (2009-FOIA-1238 & 2009-FOIA-3496). *See* ACLU FOIA Request to ICE, No. 2011-FOIA-0002, at 1 (Sept. 21, 2010). In that FOIA request of January 13, 2009 (2009-FOIA-1238 & 2009-FOIA-3496), we requested records concerning "prolonged detainees who were released from custody on November 14, 2001 onward *because they won their removal cases*." *See id.* (quoting ACLU FOIA Request, No. 2009-FOIA-1238 & 2009-FOIA-3496, at Qu. 3 (Jan. 13, 2009)). In response to this question, your office produced a spreadsheet ("Response . . . Q3") that listed 5,928 detainees and provided certain information about their cases. We provided all this data to your office, including a copy of the spreadsheet your office had produced, in the FOIA Request at issue. *See* ACLU FOIA to ICE, No. 2011-FOIA-0002, at 1-2, Exhibit B (Sept. 21, 2010).

Thus, if your production in response to our FOIA request of January 13, 2009 (2009-FOIA-1238 & 2009-FOIA-3496) was responsive, then the 5,928 individuals listed in the spreadsheet should be those who were

released from custody *because they won their removal cases*. Moreover, we have waited over one year's time to obtain clarification from your office about the data your office produced in response to our FOIA request of January 13, 2009 (2009-FOIA-1238 & 2009-FOIA-3496). *See* ACLU Letter to Pavlik-Keenan, 2009-FOIA-1238 & 2009-FOIA-3496, at 2 (Nov. 20, 2009) (seeking clarification on the search queries used to produce data in response to, *inter alia*, Question 3). Accordingly, there are no further details or clarification we can provide your office because (a) your office is the source of the 5,928 individuals about which we seek information and (b) we have not obtained the information we have requested for months concerning how your office obtained this data on the 5,928 individuals.

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION

Second, your letter indicates the need for "additional information identifying the detainees for the purposes of retrieving their A-file" With regard to the information we seek that may be contained in the 5,928 individuals' A-files, Mr. Graff's email of December 1, 2010 stated that A-files are usually maintained at U.S. Citizenship and Immigration Services ("USCIS"), but can be in the custody of Enforcement and Removal Operations ("ERO") field offices based on the stage of removal proceeding an individual is in.

With respect to your reference as to which Department of Homeland Security ("DHS") entity has possession of certain information that you believe may be in A-files, please note that the DHS Privacy Office was one of the recipient parties of our FOIA Request (2011-FOIA-0002). Thus, we have properly requested any and all information that may be contained in A-files, and if ICE and/or DHS believes that a different agency within DHS should be contacted for information not in ERO's custody, our FOIA Request should be forwarded to that agency as necessary.

Sincerely,



Tanaz Moghadam
Attorney
American Civil Liberties Union
Immigrants' Rights Project
125 Broad Street, 18th Floor
New York, NY 10004

EXHIBIT Q

U.S. Department of Homeland Security

800 North Capitol Street NW, Stop 5009
Washington, DC 20536-5009



U.S. Immigration
and Customs
Enforcement

January 25, 2011

Tanaz Moghadam, Esq.
Immigrants' Rights Project
ACLU
125 Broad Street, 18th Floor
New York, NY 10004

Re: **FOIA Case Number 2011-FOIA-0002**

Dear Mr. Moghadam:

This letter is in response to your December 20, 2010 letter regarding your Freedom of Information Act (FOIA) request to the Department of Homeland Security (DHS), dated September 21, 2010, seeking records related to nearly 6000 prolonged immigration detainees released from ICE custody after winning their removal cases. Your request was received in this office on October 1, 2010.

In your letter, you have indicated that the definition of the phrase "winning their removal case" should be construed to include the entire scope of all 5,928 detainees who were included in the excel spreadsheet provided to you in response to 2009FOIA1238. We appreciate this clarification and will apply it any documents processed pursuant to your request.

However, you have failed to include information sufficient to identify these individuals for the purposes of retrieving records from each respective detainee's A-file. As you were informed in the letter dated December 8, 2010, the request must contain sufficient information to identify each individual for whom records from an A-file are being sought. Your letter dated December 20, 2010 does not provide any additional information identifying the detainees for the purposes of retrieving the A-file, but only reiterated the December 1, 2010 email from Mr. Graff as to the custody of A-files generally. As such, the personally identifying information sufficient to retrieve any specific A-file is lacking in your request. The excel spreadsheet containing the 5,928 detainees in response to your original request (2009FOIA1238) was provided to this office, and in turn provided to you, without the original A-numbers of the detainees listed. Absent an A-number, or other personal identifiable information, we are unable to process your request as it does not reasonably describe the records being sought.¹

After careful review of your FOIA request, we determined that your request is too broad in scope or did not specifically identify the records which you are seeking. Records must be described in reasonably sufficient detail to enable government employees who are familiar with the subject

¹ 5 U.S.C. § 552(a)(3)(A) (2000).

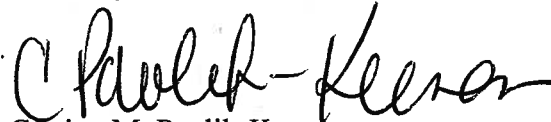
area to locate records without placing an unreasonable burden upon the agency. For this reason, §5.3(b) of the DHS regulations, 6 C.F.R. Part 5, requires that you describe the records you are seeking with as much information as possible to ensure that our search can locate them with a reasonable amount of effort. Whenever possible, a request should include specific information about each record sought, such as the date, title or name, author, recipients, and subject matter of the records, if known, or the DHS component or office you believe created and/or controls the record. The FOIA does not require an agency to create new records, answer questions posed by requesters, or attempt to interpret a request that does not identify specific records.

Additional information identifying the detainees for the purposes of retrieving their A-file is necessary to properly request the A-files from USCIS for processing and for record quantification purposes and fee estimation. Please resubmit your request containing a reasonable description of the records you are seeking. Upon receipt of a perfected request, you will be advised as to the status of your request.

If we do not hear from you within (10) days from the date of this letter, we will assume you are no longer interested in this FOIA request, and the case will be administratively closed. Please be advised that this action is not a denial of your request and will not preclude you from filing other requests in the future.

If you need to contact our office about this matter, please refer to FOIA case number **2011FOIA0002**. This office can be reached at (202) 732-0300 or (866) 633-1182.

Sincerely,

A handwritten signature in black ink, appearing to read "C Pavlik-Keenan".

Catrina M. Pavlik-Keenan
FOIA Officer

EXHIBIT R



February 4, 2011

Catrina Pavlik-Keenan
FOIA Officer
U.S. Immigration and Customs Enforcement
800 North Capitol Street, NW, Stop 5009
Washington, D.C. 20536

Dear Ms. Pavlik-Keenan:

I am writing in connection with the letter of January 25, 2010 that you sent to our office regarding FOIA Case Number 2011-FOIA-0002.

As we stated in our letters to you dated September 21, 2010 and December 20, 2010, the 5,928 detainees about whom you request information were set forth in a spreadsheet provided by your office in response to an earlier FOIA request by the ACLU. In the instant FOIA Request, we provided you with a copy of that spreadsheet. We do not have any further information regarding those detainees because your office has declined to provide us with such information and any additional information necessary to identify the records pertaining to those detainees is in your agency's possession.

We have tried to be patient with ICE, but congressionally mandated deadlines for your agency to respond to our FOIA requests of September 21, 2010 have long since passed. Accordingly, we request that you provide us with responsive records within 20 days of this letter or the ACLU will deem its administrative remedies exhausted.

Sincerely,

Tanaz Moghadam
Attorney
American Civil Liberties Union
Immigrants' Rights Project
125 Broad Street, 18th Floor
New York, NY 10004

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
IMMIGRANTS'
RIGHTS PROJECT

PLEASE RESPOND TO:
NATIONAL OFFICE
125 BROAD STREET, 18TH FL.
NEW YORK, NY 10004-2400
T/212.549.2660
F/212.549.2654
WWW.ACLU.ORG

OFFICERS AND DIRECTORS
-SUSAN H. HERMAN
PRESIDENT

ANTHONY D. ROMERO
EXECUTIVE DIRECTOR

EXHIBIT S

U.S. Department of Homeland Security
800 N. Capitol St., NW STOP 5009
Washington, DC 20536-5009



U.S. Immigration
and Customs
Enforcement

February 24, 2011

Tanaz Moghadam, Esq.
Immigrants' Rights Project
ACLU
125 Broad St. 18th Floor
New York, NY 10004

RE: OPLA11-078, 2011FOIA0002

Dear Mr. Moghadam:

This is in response to your letter dated December 23, 2010 appealing U.S. Immigration and Customs Enforcement's (ICE) decision to hold your fee waiver request in abeyance and to deny the expedited processing of your Freedom of Information Act (FOIA) request. Your initial request asked for records related to nearly 6000 prolonged immigration detainees released from ICE custody after winning their removal cases. On January 25, 2011 the agency responded with a letter indicating that you had not reasonably described the records being sought, and that your request would be closed 10 days from the date of that letter if ICE did not receive a revised request reasonably describing the records being sought.

Your request was not revised, and your request was administratively closed. As such, ICE is administratively closing your appeal of the decision holding the fee waiver in abeyance and the denial of expedited processing as moot. This does not constitute a waiver of any future fees incurred in processing this or any other request.

Should you have any questions regarding this appeal closure, please contact ICE at ice-foia@dhs.gov. In the subject line of the email please include the word "appeal", your appeal number, which **OPLA11-078**, and the FOIA case number, which is **2011FOIA0002**.

Sincerely,

A handwritten signature in black ink, appearing to read "Susan Mathias for".

Susan Mathias

Chief

Government Information Law Division
ICE Office of the Principal Legal Advisor
Department of Homeland Security

EXHIBIT T



September 21, 2010

Catrina Pavlik-Keenan
FOIA Officer
U.S. Immigration and Customs Enforcement
800 North Capitol St., NW
5th Floor, Suite 585
Washington, DC 20528

Catherine M. Papoi
FOIA Officer
U.S. Department of Homeland Security
Privacy Office
Director, Disclosure & FOIA
245 Murray Drive SW, Bldg. 410
Mail Stop 0550
Washington, DC 20528-0550

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PLEASE RESPOND TO:
NATIONAL OFFICE
125 BROAD STREET, 18TH FL.
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WWW.ACLU.ORG

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OFFICERS AND DIRECTORS
SUSAN N. HERMAN
PRESIDENT

ANTHONY D. ROMERO
EXECUTIVE DIRECTOR

RICHARD ZACKS
TREASURER

**RE: Second FOIA Request for Records Related to the Post-Order
Custody Review Process (POCR)**

Dear Freedom of Information Officers:

This letter constitutes a request pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, submitted on behalf of the Immigrants' Rights Project (IRP) of the American Civil Liberties Union (ACLU). The IRP is also requesting the expedited processing of this request, pursuant to 5 U.S.C. § 552(a)(6)(E) and agency regulations, and a fee waiver, pursuant to 5 U.S.C. § 552(a)(4)(A)(iii). This request is being simultaneously filed with the U.S. Immigration and Customs Enforcement (ICE) and the U.S. Department of Homeland Security (DHS).

BACKGROUND

In 2001, the Supreme Court held that, under the Immigration and Nationality Act, 8 U.S.C. § 1231, a noncitizen with a final order of removal can only be detained for the period reasonably necessary to effectuate his or her removal from the United States. The Court also found six months from the date of a final order of removal to be a presumptively reasonable period of time. *See Zadvydas v. Davis*, 533 U.S. 678, 701 (2001). Regulations designed to

implement *Zadvydas* were promulgated in November 2001.¹ These regulations established a set of post-order custody review (POCR) procedures for determining, *inter alia*, whether an individual detainee will be detained or released following the 90 day removal period, *see* 8 C.F.R. § 241.4, and whether there is a significant likelihood of removal in the reasonably foreseeable future. *See* 8 C.F.R. § 241.13.

Since its establishment, however, immigrants' rights advocates and government oversight bodies alike have expressed serious concerns about the POCR process' adequacy. Reviews of the POCR process strongly suggest that it does not afford meaningful, fair, and individualized review to prolonged immigration detainees and that ICE officials are not making appropriate determinations as to release or continued detention.²

Moreover, the government is currently applying the POCR procedure to noncitizens whose removal orders have been judicially stayed pending adjudication of their immigration appeals, even though the regulations are silent as to these individuals. Immigration law practitioners regularly report that the government appears to treat the existence of a stay as a *per se* basis for denying release, on the grounds that individuals with stays are inherent flight risks.

As *Zadvydas* makes clear, the inadequacy of the POCR process implicates serious constitutional concerns as “[f]reedom from imprisonment—from government custody, detention, or other forms of restraint—lies at the heart of the liberty.” *Zadvydas*, 533 U.S. at 682, 690. Moreover, the issue of the

¹ *See* Continued Detention of Aliens Subject to Final Orders of Removal, 66 Fed. Reg. 56967 (Nov. 14, 2001) codified at 8 C.F.R. §§ 241.4, 241.13, 241.14.

² *See, e.g.*, General Accounting Office, *Better Data and Controls Are Needed to Assure Consistency with the Supreme Court Decision on Long-Term Alien Detention*, GAO-04-434 (May 2004) (finding that ICE's database could not even identify the detainees entitled to a custody review and that ICE was possibly violating POCR regulations); Dep't of Homeland Security Office of the Inspector General, *ICE's Compliance with Detention Limits for Aliens with a Final Order of Removal from the United States*, OIG-07-28, at 1 (Feb. 2007) (reporting ICE's failure to provide custody reviews in a timely manner and, in some cases, its failure to provide them at all; ICE's improper suspension of detainees from the review process; ICE's failure to provide sufficient guidance to its field offices on *Zadvydas*; non-uniform practices across field offices; and ICE's ineffective oversight efforts); Kathleen Glynn & Sarah Bronstein, *Systemic Problems Persist In U.S. ICE Custody Reviews for "Indefinite" Detainees*, at 1-2 (Catholic Legal Immigration Network, Inc. 2005) (reporting poor record keeping, failure to conduct timely custody reviews, staff shortages, lack of communication with and information provided to detainees, and non-uniform practices across field offices).

POCR process' adequacy has become especially acute as the government exponentially increases its use of immigration detention and subjects increasing numbers of noncitizens to prolonged imprisonment.³

Public scrutiny of the POCR process is therefore necessary to ensure the agency manages its detained population in a manner that is consistent with its statutory and constitutional obligations. While the reports on the POCR to date are certainly useful, they are limited in scope, and none of the underlying agency records are readily available for review.⁴ Far more information is needed for a full review of POCR process.

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RECORDS REQUESTED

Please disclose:

1. All records⁵ reflecting the following information for individuals who had been detained *six months or longer* since being taken into ICE custody (i.e., "prolonged detainees") on the date the search is conducted (please run the search as a "snapshot" as of the date, *not* as a range of time up until the date):
 - a. The number of such detainees organized by field office.
 - b. The nationality of such detainees.
 - c. The length of such detainees' detention since being taken into ICE custody.

³ For example, in 1997, the number of immigrants detained by the U.S. Immigration and Naturalization Service on any given day was approximately 13,000. U.S. Dep't of Justice, Office of the Federal Detention Trustee, Detention Needs Assessment and Baseline Report: a Compendium of Federal Detention Statistics, *available at* <http://www.usdoj.gov/ofdt/>. Just ten years later, the national daily ICE detainee population had surpassed 30,000. Anna Gorman, *Immigration Detainees are at Record Levels*, L.A. Times, Nov. 5, 2007, at B1. *See also* OIG-07-28, at 1 (finding that ICE "is not well positioned to oversee the growing detention caseload that will be generated by DHS' planned enhancements to secure the border.").

⁴ For example, the OIG's review did not address the "sufficiency of release decisions" and the "success of alternatives to detention," and the study was also not designed to review ICE practices nationwide. *See* OIG-07-28, at 44. The CLINIC report was generated from interviews with practitioners lacking full and direct access to agency records.

⁵ Please include all records, including, but not limited to, memoranda, correspondence, analyses, evaluations, policies, reports, notes of meetings, and other written and printed records or records in any other format, including records kept in electronic format on computers and/or other electronic storage devices, electronic communications and/or video tapes.

- d. The number of such detainees with an administratively final order of removal (on date of snapshot).
 - e. The number of such detainees with an administratively final order of removal that was judicially stayed (on date of snapshot).
 - f. The number of such detainees whose removal proceedings were pending before the Immigration Judge (on date of snapshot).
 - g. The number of such detainees whose removal proceedings were pending before the Board of Immigration Appeals (on date of snapshot).
 - h. The number of such detainees whose removal proceedings were pending before the Court of Appeals (on date of snapshot).
 - i. The number of such detainees whose removal proceedings were pending before the Immigration Judge or Board of Immigration Appeals on remand (on date of snapshot).
2. All 90-day, 180-day, and any subsequent post-order custody review (POCR) decisions for individuals who were detained *six months or longer* since being taken into ICE custody (i.e., “prolonged detainees”) from November 1, 2008 onwards, organized per detainee.
 3. All records reflecting the following information for individuals who were detained *six months or longer* since being taken into ICE custody (i.e., “prolonged detainees”) from November 14, 2001 onward and who ultimately prevailed in their removal proceedings:
 - a. The start and end dates of such detainees’ detention.
 - b. The number of such detainees organized by field office.
 - c. The nationality of such detainees.
 - d. The length of such detainees’ detention.
 - e. The statutory basis for such detainees’ detention (i.e., 8 U.S.C. §§ 1225, 1226(a), 1226(c), or 1231)
 - f. The justification for detaining each of these individuals, including, but not limited, to copies of their custody review determinations, their bond hearing determinations, their parole requests and denials, any reviews of their custody determinations by immigration judges, and any other documents concerning their continued detention.
 - g. The specific basis for their release (i.e., “proceedings terminated,” cancellation of removal granted, adjustment of status granted, asylum granted).
 4. All 90-day, 180-day, and any subsequent post-order custody review (POCR) decisions for individuals who were detained *six months or longer* since being taken into ICE custody (i.e., “prolonged

detainees”) who were released from custody from November 14, 2001 onwards because they won their removal cases, organized per detainee.

5. All records reflecting the following information for detainees who were released at their 90-day custody review from November 14, 2001 onward:
 - a. The number of such detainees per year.
 - b. The number of such detainees organized by field office.
 - c. The nationality of such detainees.
 - d. The number of such detainees with an administratively final order of removal that was judicially stayed, and the field office and nationality of such detainees
6. All records reflecting the following information for detainees who were detained six months or longer *following the entry of an administratively final order of removal that was not judicially stayed* (i.e., “Zadvydas detainees”), including those who were eventually released, those who were eventually removed, and those who continue to be detained, from November 14, 2001 onward.
 - a. The number of such detainees per year, including those released, those removed, and those who continue to be detained.
 - b. The number of such detainees organized by field office.
 - c. The nationality of such detainees.
 - d. The date of such detainees’ final administrative order of removal, and if the removal order was at any point stayed, the date that the stay was lifted.
 - e. The length of such detainees’ total detention, from when they were first taken into ICE custody.
 - f. The length of such detainees’ post-final-order detention (i.e., from when a final administrative order was issued, or in the case of a removal order that was stayed, from the date when the stay was lifted).
 - g. For those detainees who were released from detention, the reason for their release (viz., the “book out” date).
7. All 90-day, 180-day, and any subsequent post-order custody review (POCRs) decisions for all detainees who were detained six months or longer *following the entry of an administratively final order of removal that was not judicially stayed* (i.e., “Zadvydas detainees”) from November 14, 2001 onwards, organized per detainee.
8. All records reflecting the following information for all detainees who were detained six months or longer *following the entry of an administratively final order of removal that was not judicially stayed* (i.e., “Zadvydas detainees”) and who were released from custody

from November 14, 2001 onward for the purpose of immediate removal from the United States:

- a. The number of such detainees per year.
 - b. The start and end dates of their detention.
 - c. The number of such detainees organized by field office.
 - d. The nationality of such detainees.
 - e. The date of such detainees' final administrative order of removal, or in the case of a removal order that was at any point stayed, the date that the stay was lifted.
 - f. The length of such detainees' total detention from when they were first taken into ICE custody.
 - g. The length of such detainees' post-final-order detention (i.e., from when a final administrative order was issued, or in the case of a removal order that was stayed, from the date when the stay was lifted).
9. All records reflecting the following information for all detainees with administratively final orders of removal that were not judicially stayed (not just those detained six months following the entry of a final order of removal that was not judicially stayed), and who were released from custody from November 14, 2001 onward *because their removal was not significantly likely in the reasonably foreseeable future*:
- a. The number of such detainees released per year.
 - b. The start and end dates of their detention.
 - c. The number of such detainees released per year by field office.
 - d. The nationality of such detainees.
 - e. The date of such detainees' final administrative order of removal, and if the removal order was stayed, the date the stay was lifted.
 - f. The length of such detainees' total detention since being taken into ICE custody.
 - g. The length of such detainees' post-final-order detention (i.e., from when a final administrative order was issued, or in the case of a removal order that was stayed, from the date when the stay was lifted).
 - h. The number of such detainees who filed petitions for writs of habeas corpus, and the case name and court where such petitions were filed.
 - i. The number of such detainees who were released after filing writs of habeas corpus.
 - j. The numbers of such detainees who are currently released on supervision orders.

- k. The conditions of supervised release of such detainees, including but not limited to release notices and orders, supervision orders, Intensive Supervision and Appearance Program (ISAP) conditions, and Enhanced Supervision/Reporting (ESR) conditions.
 - l. The number of such detainees who have subsequently been removed.
10. All records reflecting the following information for all detainees with administratively final orders of removal that were not judicially stayed (*not* just those detained six months following the entry of a final order of removal that was not judicially stayed), and who were released from custody from November 14, 2001 onward *for reasons other than their removal not being significantly likely in the reasonably foreseeable future*:
- a. The number of such detainees released per year.
 - b. The start and end dates of their detention.
 - c. The number of such detainees released per year by field office.
 - d. The nationality of such detainees.
 - e. The date of such detainees' final administrative order of removal, and if the removal order was stayed, the date the stay was lifted.
 - f. The length of such detainees' total detention since being taken into ICE custody.
 - g. The length of such detainees' post-final-order detention (i.e., from when a final administrative order was issued, or in the case of a removal order that was stayed, from the date when the stay was lifted).
 - h. The number of such detainees who filed petitions for writs of habeas corpus, and the case name and court where such petitions were filed.
 - i. The number of such detainees who were released after filing writs of habeas corpus.
 - j. The numbers of such detainees who are currently released on supervision orders.
 - k. The conditions of supervised release of such detainees, including but not limited to release notices and orders, supervision orders, Intensive Supervision and Appearance Program (ISAP) conditions, and Enhanced Supervision/Reporting (ESR) conditions.
 - l. The number of such detainees who have subsequently been removed.

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11. All records related to DHS, ICE, Headquarters Post-Order Detention Unit (HQPDU), and individual ICE field office policies, procedures, and/or guidelines on POCRs and conditions of supervised release, including but not limited to manuals, guidances, instructions, policy statements, legal memoranda, training materials, and sample forms, worksheets, and letters.
12. All records related to DHS, ICE, Headquarters Post-Order Detention Unit (HQPDU), and individual ICE field office policies, procedures, and/or guidelines regarding the detention, custody review, release, and conditions of supervision of noncitizens whose removal has been judicially stayed, including but not limited to manuals, guidances, instructions, policy statements, legal memoranda, training materials, and sample forms, worksheets, and letters.
13. All records reflecting the following information for individuals who were detained under the mandatory detention provision, 8 U.S.C. § 236(c), from November 14, 2001 onward and who ultimately prevailed in their removal cases:
 - a. The start and end dates of their detention.
 - b. The start and end dates of their detention when they were held under § 236(c).
 - c. The date that removal proceedings were terminated or otherwise concluded in their favor.
 - d. The number of such detainees organized by field office.
 - e. The nationality of such detainees.
 - f. The specific basis for their release (i.e., “proceedings terminated,” cancellation of removal granted, adjustment of status granted, asylum granted).

THE REQUESTOR

The ACLU is a nationwide, nonprofit, and nonpartisan organization dedicated to protecting civil rights and civil liberties in the United States. It is the largest civil liberties organization in the country, with offices in the 50 states and over 500,000 members. The ACLU is dedicated to holding the U.S. government accountable to principles of due process and the U.S. Constitution in general, including those principles that bear on detention and other significant deprivations of liberty.

The ACLU publishes newsletters, news briefings, right-to-know handbooks, and other materials that are widely disseminated to the public. These materials are made available to everyone—including tax-exempt organizations, non-profit groups, and law students and law faculty—for either no cost or for a nominal fee through its public education department.

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The ACLU also disseminates information through its high-traffic website, <http://www.aclu.org>. The website provides in-depth information on a range of civil liberties issues; address civil liberties issues that are currently in the news; and contains hundreds of documents relating to the ACLU's work. The website also specifically features information obtained through the FOIA. *See, e.g.,* <http://www.aclu.org/safefree/torture/torturefoia.html>; http://www.aclu.org/patriot_foia/index.html. The ACLU also publishes an electronic newsletter, which is distributed to subscribers via email; airs regular podcasts; and produces a television series on civil liberties issues entitled *The Freedom Files*. *See* <http://aclu.tv>.

Accordingly, the ACLU is an organization whose "main professional activity or occupation is information dissemination." 6 C.F.R. § 5.5(d)(3). The ACLU is also a "representative of the news media" within the meaning of the statute and applicable regulations. *See* 5 U.S.C. § 552(a)(4)(A)(iii), (defining a representative of the news media as an entity that "gathers information of potential interest to a segment of the public" and "uses its editorial skills to turn raw materials into a distinct work, and distributes that work to an audience"); *see also National Sec. Archive v. U.S. Department of Defense*, 880 F.2d 1381, 1397 (D.C. Cir. 1989) (same); 45 C.F.R. § 5.5 (defining representative of the news media as "a person actively gathering information for an entity organized and operated to publish or broadcast news to the public").

EXPEDITED PROCESSING

We request Track 1 expedited treatment for this FOIA request. This request qualifies for expedited treatment pursuant to 5 U.S.C. § 552(a)(6)(E) and applicable regulations. As set forth above, there is a "compelling need" for expedited processing of this request, *see* 5 U.S.C. § 552(a)(6)(E)(i)(I), namely, an "urgency to inform the public concerning actual or alleged Federal Government activity." 5 U.S.C. § 552(a)(6)(E)(v)(II); *see also* 6 C.F.R. § 5.5(d)(1)(ii) (same). The ACLU is therefore entitled to expedited processing of this request.

FEE WAIVER

The ACLU also requests a full fee waiver on the grounds that disclosure of the requested records is in the public interest and is "likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii); *see also* 45 C.F.R. § 5.45.

As set forth above, this request aims at furthering public understanding of government conduct: specifically, whether the post-order custody reviews for detainees in the custody of ICE are sufficient to satisfy the agency's statutory and constitutional obligations. In this respect, the request strongly resembles the many previous instances in which government waived all fees associated with responding to FOIA requests by the ACLU.⁶

In any event, as discussed *supra*, the ACLU is a "representative of the news media" and does not seek the records requested for commercial use. Accordingly, should the government assess fees for the processing of this request, those fees should be "limited to reasonable standard charges for document duplication" alone. 5 U.S.C. § 552(a)(4)(A)(ii)(II).

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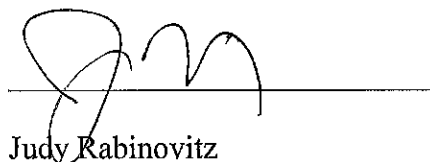
Thank you for your consideration of this request. If this request is denied in whole or in part, the ACLU asks that the government justify all redactions by reference to the specific exemptions of the FOIA. We expect that the government release all segregable portions of otherwise exempt material. We reserve the right to appeal a decision to withhold any information or to deny expedited processing or a waiver of fees. We look forward to your request to our request for expedited processing within ten (10) business days, as required under 5 U.S.C. § 552(a)(6)(E)(ii)(I). Notwithstanding our request for expedited processing, we alternatively look forward to your reply to this request within twenty (20) business days, as required under 5 U.S.C. § 552(a)(6)(A)(I).

Please respond to Judy Rabinovitz, Deputy Director, ACLU Immigrants' Rights Project, 125 Broad St., 18th Floor, New York, NY 10004, Tel: 212-549-2618, Email: jrabinovitz@aclu.org. Also, please notify us in advance if the cost of photocopying the documents requested exceed \$100.00.

* * *

⁶ The following are recent examples of requests in which agencies did not charge the ACLU fees associated with responding to its FOIA requests: (1) a FOIA request submitted to the Department of State in April 2005; (2) a FOIA request submitted to the National Institute of Standards and Technology in April 2005; (3) a FOIA request submitted to the Office of Science and Technology in the Executive Office of the President in August 2003; (4) a FOIA request submitted to the Federal Bureau of Investigation in August 2002; (5) a FOIA request submitted to the Office of Intelligence Policy and Review in August 2002; (6) a FOIA request submitted to the Office of Information and Privacy in the Department of Justice in August 2002.

Under penalty of perjury, I certify, to the best of my knowledge and belief,
that the above information is true and correct.

A handwritten signature in black ink, appearing to be 'Judy Rabinovitz', is written over a horizontal line.

Judy Rabinovitz
ACLU Immigrants' Rights Project
125 Broad St., 18th Floor
New York, NY 10004
Tel: 212-549-2618
Fax: 212-549-2654
Email: jrabinovitz@aclu.org

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